



PRIVILEGED AND CONFIDENTIAL DRAFT

The Thoroughbred Horsemen's Associations, Inc. ("THA"), Thoroughbred Owners of California ("TOC"), Kentucky Thoroughbred Association ("KTA"), Thoroughbred Owners and Breeders Association ("TOBA"), and Mid-Atlantic Strategic Plan to Reduce Equine Fatalities (hereinafter collectively referred to as the "Commenters") submit this comment to the Federal Trade Commission ("FTC" or "Commission ") in response to the proposed HISA Enforcement Rule, Docket No. FTC-2021-0076. The proposed Rule submission is a set of individual enforcement-related Rules proposed by the Horseracing Integrity and Safety Authority ("HISA" or the "Authority").

The Commenters comprise many of the leading associations of licensed Thoroughbred horse owners and trainers in the United States, as well as the industry stakeholders and regulators from the Mid-Atlantic region, and we have – sometimes individually and sometimes jointly – provided feedback to the Authority as it develops its Rules. We have been intimately involved in developing rules and standards for equine health, safety and welfare and the integrity of racing in the heavily state-regulated horse racing industry for many years. We previously filed a comment on the Authority's proposed Racetrack Safety Rules, Docket No. FTC-2021-0076, on January 19, 2022 (the "January 19 comment").

Commenters generally support the implementation of strong enforcement mechanisms to help protect the health and safety of covered horses. With respect, we believe that certain aspects of the proposed enforcement Rules are inconsistent with the Act and the Commission's rules, and should be remanded to the Authority and/or subject to an interim final rule to resolve the specific issues we highlight.

## **I. BACKGROUND ON COMMENTERS.**

Commenters include trade associations of horse owners and trainers, who represent the collective interests of a substantial portion of horse owners and trainers in this country in the regular contractual process and conduct of racing with racing associations, amongst industry organizations, and before local, State and federal governmental bodies. Additional information about commenters can be found in the January 19 Comment.

- The THA represents more than 20,000 owners and trainers through its constituent organizations at major racetracks in New York, New Jersey, Maryland, Delaware, Pennsylvania and Illinois and is a highly regarded and influential voice on all issues affecting owners and trainers.
- The TOC represents the interests of Thoroughbred owners and trainers in California who race at Santa Anita, Del Mar, Golden Gate and Los Alamitos and is highly influential in California racing and in national organizations.
- The KTA is a highly influential organization of owners, trainers and breeders in Kentucky and in state and national organizations.
- The TOBA is a national organization of owners and breeders. Among its responsibilities is the Graded Stakes Committee, which ranks races in the United

States in relation to their quality and importance. The value of horses, particularly for breeding purposes, is affected by their ability to compete and win races that are given “black type” by the Graded Stakes Committee.

- The Mid-Atlantic Strategic Plan to Reduce Equine Fatalities (the “Plan”) is a coalition of horsemen’s organizations, racing associations, regulators, veterinarians, breeders and other industry stakeholders in eight (8) States in the Mid-Atlantic region (the largest concentration of daily live racing in the United States), who have combined to implement an ongoing strategic plan comprised of rules, protocols and best practices designed to enhance equine health, safety and welfare, identify horses potentially at risk of fatal injury and reduce equine fatalities.

## II. STANDARD OF REVIEW AND REQUEST FOR RELIEF.

As the Commission has noted, “[t]he Act gives the Commission two criteria against which to measure proposed rules and rule modifications: ‘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.’” *HISA Enforcement* Proposed Rule, 87 Fed. Reg. 4023, 4027 (Jan. 26, 2022) (citing 15 U.S.C. § 3053(c)(2)). “In other words, the Commission will evaluate the proposed rule for its consistency with the specific requirements, factors, standards, or considerations in the text of the Act as well as the Commission’s procedural rule.” *Id.*

The Commission’s procedural rule, in turn, requires a significant amount of information to justify rules, including evidence that must be “sufficiently detailed and contain sufficient analysis to support a Commission finding that a proposed rule or modification satisfies the statutory requirements. For instance, a mere assertion or conclusory statement that a proposed rule or modification is consistent with the requirements of the Act is insufficient.” 16 C.F.R. § 1.142(e).

As explained in our January 19 Comment, the Commission could take one of two steps to address issues with the Authority’s proposed rule. First, it could disapprove the specific rule and adopt the Commenters’ recommendation for modification, and allow the Authority to resubmit the rule. 15 U.S.C. § 3053(c)(3)(A). In the alternative, the Commission could adopt an interim rule, pursuant to 15 U.S.C. § 3053(e), that implements the remainder of the Authority proposed enforcement rule, with the modifications proposed by Commenters, in order to protect the health and safety of covered horses. *Id.*

## III. SPECIFIC RULE PROVISIONS SHOULD BE DISAPPROVED BY THE FTC AND REMANDED FOR FURTHER DEVELOPMENT.

Below we outline the specific Rule provisions that the FTC should disapprove based on the statute and the FTC’s rules, and that should be remanded for further consideration by the Authority. We include proposed alternatives for the FTC’s consideration.

**A. Imposition of an Arbitrary Financial Penalty Range and Mandatory Minimum in Rule 8200.**

**1. Authority's Proposed Rule.**

Proposed Rule 8200(b)(2)(ii):

(b) Imposition of Sanction. 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 finding a violation or failure to comply with the regulations of the Authority with the exceptions identified in paragraph (a), may impose one or more of the following sanctions on a Covered Person for each violation of the rules of the Authority:

(2) impose a fine upon a Covered Person in the following amounts:

(i) Up to \$50,000 for a first violation, or

(ii) from \$50,000.00 to \$100,000.00 for a second violation of the same or similar nature to a prior violation, or any violation that due to its nature, chronicity, or severity poses an actual or potential threat of harm to the safety, health, and welfare of Covered Persons, Covered Horses, or the integrity of Covered Horseraces;

**2. Deficiencies in Proposed Rule.**

Rule 8200(b) effectively sets a penalty threshold for a first violation that seems arbitrary and excessive. Commenters agree that the Authority and other listed entities should have the ability to impose substantial penalties commensurate with the nature of the violation, but no standards or guidance is given, unlike penalties for improper use of the riding crop. Further, we believe that 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 based on the specific conduct. As a result of such limited discretion, either no penalty may be imposed or one that is too high based on the facts.

The Authority does not provide sufficient support for a minimum financial penalty that would apply across all potential violations related to safety, or for such a wide range of financial penalties without standards or guidance. This is in contrast to the penalties for riding crop violations, for example, which are covered in the separate Racetrack Safety Rules (and discussed in Commenters' January 19 Comment). Those penalties are tailored to the severity of the violation (and also involve much lower financial amounts). The lack of guidance and the blanket minimum raise significant question as to the requirement that the Authority grant "due process" in 15 U.S.C. § 3057(c)(3). In any event, the Authority does not adequately justify its approach in its Federal Register submission. On the contrary, the Authority's justification focuses on its ability to tailor penalties to the seriousness of a violation, which is inconsistent with a lack of guidance and a mandatory minimum for financial penalties. We note that FINRA, upon which

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HISA relies for comparative legal purposes, has Sanctions Guidelines that give affected persons notice of potential penalties for rules violations.<sup>1</sup> HISA has made no such determinations and should be required to do so.

**3. Proposed Alternative.**

We recommend that HISA be required to circulate for comment and submit more detailed guidance and standards for imposition of monetary penalties under Rule 8200. In the interim, the Commission may adopt a modified rule as follows:

(2) impose a fine upon a Covered Person in the following amounts:

...

(ii) ~~from~~ ~~up to~~ \$50,000.00 ~~to~~ ~~\$100,000.00~~ for a second violation of the same or similar nature to a prior violation, or any violation that due to its nature, chronicity, or severity poses an actual or potential threat of harm to the safety, health, and welfare of Covered Persons, Covered Horses, or the integrity of Covered Horseraces;

**B. Granting Unlimited Access and Seizure Powers.**

**1. Authority's Proposed Rule.**

Proposed Rule 8400(a):

The Commission, the Authority, or their designees:

(1) Shall have free 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; and

(2) May seize any medication, drug, substance, paraphernalia, object, or device in violation or suspected violation of any provision of 15 U.S.C. 57A or the regulations of the Authority.

**2. Deficiencies in Proposed Rule.**

The statute does not allow the Commission, Authority, or any designee to have unfettered "free access" to records and facilities or seizure authority. Rather, Section 3054(h) indicates that "[t]he Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction." 15 U.S.C. § 3054(h). And indeed, Rule 8400(d) provides the Authority power to submit subpoenas for documents and witness testimony.

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<sup>1</sup> See FINRA, Sanctions Guidelines, <https://www.finra.org/rules-guidance/oversight-enforcement/sanction-guidelines>.

The Authority appears to read “investigatory authority,” broadly, but investigations require some baseline level of process. *Cf.* 15 U.S.C. § 3057(c)(3) (rules for disciplinary process require “due process”). “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 (emphasis supplied). Moreover, reading “investigatory authority” broadly would render “subpoena . . . authority” meaningless since the Authority would never need to issue a subpoena for documents. Similarly, “seizure” of property falls entirely outside of routine investigations and is inconsistent with the requirement that the Authority issue a subpoena.

Additionally, it is inappropriate for the Commission, Authority, or designee to have unfettered access to the books, records, offices, facilities and other places of business for any person who owns a Covered Horse. Why should they have access unless it is directly related to the Covered Horse? The Authority provides no justification for this. Further, regardless of the Authority’s investigatory process, the statute clearly does not also provide the Commission or unspecified “designees” comparable powers to the Authority.<sup>2</sup>

Finally, under FINRA’s enforcement , FINRA can issue requests for documents and testimony, but does not have unfettered search and seizure authority, and the request must be related to an actual investigation.<sup>3</sup> The Authority’s proposal is far too broad.

### 3. Proposed Alternative.

Delete “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”.

#### C. Failing to Ensure Veterinary or other Relevant Experts Are Included on Adjudicatory Panels.

##### 1. Authority’s Proposed Rule.

Proposed Rule 8340:

- (a) An initial hearing before the Board shall be conducted by a panel of three Board members. The Board chair shall appoint the panel members and shall also designate one of them as the chair of the panel.
- (b) An initial hearing before the Racetrack Safety Committee shall be heard by a quorum of the Racetrack Safety Committee. The Racetrack Safety Committee chair shall act as the chair of the hearing panel unless the Chair is unavailable, in which case the Racetrack

**Commented [1]:** Alan, I think the whole provision should be deleted, right? Alternatively we could add language that the Authority can issue requests for documents, etc.

<sup>2</sup> The Commission’s investigatory powers are outlined in its own rules of practice, and there is no basis to change them under the statute or for the Authority to propose a change to the Commission’s rules.

<sup>3</sup> See FINRA, Regulatory Notice 09-17, <https://www.finra.org/rules-guidance/notices/09-17> (discussing process for FINRA issuing request for documents and information under its Rule 8210 procedures).

Safety Committee chair shall designate a member of the quorum to act as the chair of the panel.

Proposed Rule 8330:

With regard to any matter involving an alleged violation of a rule established in Rule 8100, the Board of the Authority may at its discretion and taking into account the seriousness of the violation and the facts of the case:

- (a) Refer the matter to the National Stewards Panel for adjudication in conformity with the procedures established in the Rule 7000 Series;
- (b) Refer the matter to an independent Arbitral Body for adjudication in conformity with the procedures established in the Rule 7000 Series;

## **2. Deficiencies in Proposed Rule.**

The proposed process in Rule 8340 allows for sub-groups of the Authority's Board and Racetrack Safety Committee to adjudicate disputes. The Authority generally justifies this process by noting that "[t]he hearing process is necessary to ensure that the penalties imposed upon Covered Persons are based upon a legitimate legal process that comports with the principles of due process." 87 Fed. Reg. at 4026. However, as a result, no veterinary or other relevant expert may be included on any individual hearing panel. There is a danger that hearing panels could be populated with individuals who lack substantive knowledge. This should be remedied. The potential violations to be adjudicated may include details questions around equine medication, treatment, and safety, that will require specialized expertise. Without inclusion of such expertise on the panel, the Authority will not accomplish its stated goal of achieving "due process." Any hearing panel should be populated with a qualified expert related to the asserted violation.

As for Rule 8330, here and elsewhere, the Authority refers to a "National Stewards Panel" and an "Arbitral Body," but these are not defined. 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 as well.

## **3. Proposed Alternative.**

Proposed Rule 8340:

- (a) An initial hearing before the Board shall be conducted by a panel of three Board members. The Board chair shall appoint the panel members and shall also designate one of them as the chair of the panel.
- (b) An initial hearing before the Racetrack Safety Committee shall be heard by a quorum of the Racetrack Safety Committee. The Racetrack Safety Committee chair shall act as the chair of the hearing panel unless the Chair is unavailable, in which case the Racetrack

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Safety Committee chair shall designate a member of the quorum to act as the chair of the panel.

(c) A hearing panel should include a veterinary or other relevant expert who has substantive knowledge of the safety issues to be considered.

**D. Referrals for “Abuse of Horse.”**

Finally, we note that the Authority should be able to classify certain abusive behavior as “abuse of horse,” and refer that behavior to appropriate criminal law enforcement authorities. This type of behavior requires a remedy that goes beyond the Authority’s ability to impose civil sanctions. Such a provision should be added as an additional step that the Authority could take in addition to the sanctions enumerated in Proposed Rule 8200.

**CONCLUSION**

For the reasons set forth above, we request that the FTC remand the identified portions of the proposed Rules with a recommendation for replacement, or issue an interim proposed rule reflecting the language suggested by Commenters, as further explained in each section above.

Respectfully submitted,

**THOROUGHBRED HORSEMEN’S ASSOCIATIONS, INC.  
THOROUGHBRED OWNERS OF CALIFORNIA  
KENTUCKY THOROUGHBRED ASSOCIATION  
THOROUGHBRED OWNERS AND BREEDERS ASSOCIATION  
MID-ATLANTIC STRATEGIC PLAN TO REDUCE EQUINE FATALITIES**

/s Alan M. Foreman

PO Box 278  
10421 Stevenson Road  
Stevenson, Maryland 21153  
alan@tharacing.com