

# Exhibit A

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 RACETRACK SAFETY RULE PROPOSED BY THE  
HORSERACING INTEGRITY AND SAFETY AUTHORITY

March 3, 2022

**I. Decision of the Commission: HISA’s Racetrack Safety 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<sup>1</sup> the text and explanation of a proposed rule by the Horseracing Integrity and Safety Authority concerning Racetrack Safety, which is required by the Act. *See id.* § 3056(c)(2)(A). “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 Racetrack Safety 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.

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<sup>1</sup> *See* Fed. Trade Comm’n, *Notice of HISA Racetrack Safety Proposed Rule* (“Notice”), 87 Fed. Reg. 435 (Jan. 5, 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 Racetrack Safety 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.<sup>2</sup> Several commenters argued that the submission was inconsistent with the procedural rule, but their concerns miss the mark.<sup>3</sup> The

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<sup>2</sup> See Notice, 87 Fed. Reg. at 436 & 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 . . .").

<sup>3</sup> For example, the Texas Racing Commission appears to contend that the Authority's iterative development of the Racetrack Safety proposed rule through the gathering of feedback from stakeholders before submitting it to the Commission violated procedural rules including "open records requirements." Letter from Virginia S. Fields, General Counsel, Tex. Racing Comm'n ("Tex. Comm'n") (Jan. 19, 2022), at 2, <https://www.regulations.gov/comment/FTC-2021-0076-0023>. But this informal give-and-take was actually encouraged by the Commission's procedural rule. See 16 C.F.R. § 1.142(f). The Animal Welfare Institute finds fault with the lack, in its view, of discussion of "how the new standards improve upon (as opposed to simply alter or rework) the National Thoroughbred Racing Association Safety and Integrity Alliance Code of Standards," which "would be beneficial for stakeholders." Letter from Dr. Joanna Grossman, Equine Manager and Senior Advisor, Animal Welfare Institute ("Animal Welfare Inst.") (Jan. 19, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0026>. But the Authority's discussion clearly met the procedural rule's incorporation of the Act's requirement in 15 U.S.C. § 3056(a)(2) that the Authority "take into consideration existing safety standards." Even if stakeholders would have benefited from more robust discussion of the proposed rule's improvements on those standards, the procedural rule's requirement was satisfied. The Iowa Horsemen's Benevolent and Protective Association contends that the Authority's submission fell far short of "the vastness of the obligations pursuant to the FTC rules requirement." Letter from Jon Moss, Executive Director, Iowa Horsemen's Benevolent & Prot. Ass'n (Jan. 17, 2022), at 1, <https://www.regulations.gov/comment/FTC-2021-0076-0018>. The procedural rule is somewhat prescriptive, to be sure, in its requiring the Authority to follow similar requirements as the Administrative Procedure Act imposes on federal agencies, such as a discussion of reasonable alternatives and a statement of basis and purpose for rulemakings. But there is not here or there any requirement for "vastness"—the Administrative Procedure Act itself requires only a "concise general statement of their basis and purpose." 5 U.S.C. § 553(c). Finally, the Thoroughbred Horsemen's Association also contends that the procedural rule "requires a significant amount of information to justify rules," which it finds lacking. Letter from Alan Foreman, Thoroughbred Horsemen's Ass'n, Inc. et al. ("Thoroughbred Horsemen") (Jan. 19, 2022), at 3, <https://www.regulations.gov/comment/FTC-2021-0076-0024>. The Thoroughbred Horsemen raise many substantive objections to the proposed rule, but these objections sound in policy differences. None of the rules on which it commented are inconsistent with the Act, as discussed below; instead, it mainly complains that the Authority violated the Commission's procedural rule, 16 C.F.R. § 1.142(a)(3), by failing to provide "reasonable alternatives to the proposed rule . . . that would accomplish the stated objective and an explanation of the reasons the Authority chose the proposed rule . . . over its alternatives." But the Authority did regularly explain such reasons. For example, the Thoroughbred Horsemen objected to the Authority's dropping of a purse-to-claim ratio limit, citing a provision of the Act as arguably conflicting, but the Commission found no such inconsistency, and the decision to drop the

remainder of this Order discusses whether the Racetrack Safety 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, the Authority’s supporting documentation and rule explanation contained in the Notice,<sup>4</sup> public comments,<sup>5</sup> and the Authority’s response to those comments.<sup>6</sup> The Commission considered 39 public comments. (41 comments were posted to the docket at Regulations.gov, with two of them duplicates.) Some comments were opposed to the proposed rule (although sometimes for reasons unrelated to the two decisional criteria),<sup>7</sup> while others reflected broad support for the proposal.<sup>8</sup> They came from

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ratio limit was explained as required by the procedural rule. *See* Thoroughbred Horsemen at 4–6. The Thoroughbred Horsemen’s detailed and substantive comment acknowledges that its objections “may not rise to the level of FTC disapproval on their own.” *Id.* at 15.

<sup>4</sup> These materials, which were posted on January 5, 2022, 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/docket/FTC-2021-0076/document>.

<sup>5</sup> Public comments, which were accepted until January 19, 2022, are available at <https://www.regulations.gov/docket/FTC-2021-0076/comments>.

<sup>6</sup> The Authority’s response, dated February 2, 2022 (“Authority’s Response”), is available on the Authority’s website, <https://hisaus.org>, and permanently at <https://perma.cc/JT4N-US35>. The Authority’s Response was led by its Racetrack Safety Committee, a statutorily mandated standing body. *See* 15 U.S.C. § 3052(c)(2). 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. 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).

<sup>7</sup> *See, e.g.*, Letter from Clara Fenger, Secretary, N. Am. Ass’n of Racetrack Veterinarians (“NAARV”) (Jan. 19, 2022), at 1–2, <https://www.regulations.gov/comment/FTC-2021-0076-0036>; Tex. Comm’n at 1–6.

<sup>8</sup> *See, e.g.*, Letter from Terence J. Meyocks, President & CEO, The Jockeys’ Guild (“Jockeys’ Guild”) (Jan. 19, 2022), at 2, <https://www.regulations.gov/comment/FTC-2021-0076-0039> (“[T]he Racetrack Safety Regulations are necessary for our sport to [en]sure the safest racing environment while establishing some uniformity, which has been lacking in our sport.”); Letter from Scott Chaney, Director, California Horse Racing Board (“Cal. Bd.”) (Jan. 12, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0007>; Letter from Kathy Guillermo, Senior Vice President, People for the Ethical Treatment of Animals (Jan. 19, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0035> (“PETA”) (emphasizing need for federal regulation in the industry, including improved racetrack safety); Letter from Edward J. Martin, President & CEO, Assoc. of Racing Comm’rs Int’l (“ARCI”) (Jan. 19, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0028>; Animal Welfare Inst. at 1 (“We appreciate the newly established Authority working swiftly to begin implementing rules on racetrack safety.”); Letter from U.S. Sen. Diane Feinstein (Jan. 19, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0040> (“Sen. Feinstein”) (commending the Authority on submitting the proposed rules particularly given the increase in horse fatalities demonstrating the danger racing can impose on horses).

many corners of the horseracing industry, advocates, elected officials, and concerned observers. Comments ranged 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 applicable Commission rules.<sup>9</sup> The Commission stated 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 and the Commission's procedural rule."<sup>10</sup> Nevertheless, the Commission received many comments that were unrelated to whether the proposed rule is consistent with the Act or procedural rule; other commenters made conclusory assertions about whether the proposed rule is consistent with the decisional criteria but provided no analysis in support of the assertions.<sup>11</sup> Because those comments do not address the statutory criteria that the Commission must use to approve or disapprove the proposed rule, they have little bearing on the Commission's determination.<sup>12</sup> 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.

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<sup>9</sup> 15 U.S.C. § 3053(c)(2).

<sup>10</sup> 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.*

<sup>11</sup> *See, e.g.,* NAARV at 1 (asserting inconsistency but never identifying how the proposed rule is inconsistent).

<sup>12</sup> This is not to say that they are not 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.

Two overarching preliminary issues merit mention at the outset. First, the Commission received several comments criticizing the 14-day comment period as too short.<sup>13</sup> For example, the Oklahoma Horse Racing Commission believed that the comment period should be extended “an additional 30 days of comment time” to allow an adequate time for review and comment.<sup>14</sup> The Florida Horsemen’s Benevolent and Protection Association likewise requested a longer comment period.<sup>15</sup>

These requests are reasonable—the Commission typically provides at least 30 and often 60 days or more for public comment—but they are also impractical under the unforgiving statutory timeline. The Act does not require the Commission to make a decision within a fixed amount of time of the closing of public comments; instead, the Commission must make its approval or disapproval decision “[n]ot later than 60 days after the date on which a proposed rule or modification is *published* in the Federal Register.” 15 U.S.C. § 3053(c)(1) (emphasis added). In other words, the period of time in which the public provides comments counts against the clock that the Commission is on to make a decision. So, if the Commission were to grant the Oklahoma Horse Racing Commission’s request for an additional 30 days of public comment, it would be left with only 16 days in which to review all the public comments and come to a reasoned decision. Especially with a deliberative multi-member body such as the Commission, such a tall task would prove insurmountable. Knowing this, the Commission’s procedural rule encouraged the Authority to gather comments and consider them before submitting its proposed rules or rule modifications to the Commission.<sup>16</sup> The Commission is grateful that the Authority

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<sup>13</sup> See Letter from Kelly Cathey, Executive Director, Oklahoma Horse Racing Commission (“Okla. Comm’n”) (Jan. 19, 2022), at 1, <https://www.regulations.gov/comment/FTC-2021-0076-0019>; ARCI at 1–3.

<sup>14</sup> Okla. Comm’n at 1.

<sup>15</sup> See Letter from Andy Belfiore, Executive Director, Fla. Horsemen’s Benevolent and Prot. Assoc. (“Fla. Horsemen”) (January 19, 2022), at 1, <https://www.regulations.gov/comment/FTC-2021-0076-0025>.

<sup>16</sup> See 16 C.F.R. § 1.142(f) (“The Authority is encouraged to solicit public comments on its proposed rule or modification in advance of making a submission to the Commission pursuant to this section.”).

did so here, and those comments and the Authority’s discussion of them form an important part of the record—and likely improved the quality of the proposed rule. The combination of pre-submission public comments taken by the Authority and a 14-day public comment period following the Notice in the *Federal Register* allowed for robust public commentary and is a reasonable compromise considering the Act’s 60-day decisional deadline.

Second, several comments asked that the Commission defer its decision mainly because the Racetrack Safety proposed rule was the first to be published for public comment. It does not, for example, provide a fee assessment methodology or cost analysis to inform state agencies of their fiscal responsibilities or other related rules such as an anti-doping and medication control enforcement rule. Several commenters complained about the omission of a funding mechanism or cost analysis and requested that the Commission not approve the rules without a funding mechanism in place where states lack information about the costs to be imposed on state authorities.<sup>17</sup> For example, the Texas Horse Racing Commission and the Florida Department of Business and Professional Regulation’s Division of Pari-Mutuel Wagering (“Florida Business Department”) objected to requiring the state to fund the Authority and its regulatory scheme.<sup>18</sup> The Texas Racing Commission asserted that the rules will be costly and that the Act forces states to fund a federal program by authorizing the Authority to collect funds from the states’ racing

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<sup>17</sup> See Letter from Eric J. Hamelback, CEO & National HBPA, Nat’l Horsemen’s Benevolent and Protective Assoc. (“Nat’l Horsemen”) (Jan. 19, 2022), at 2–3, <https://www.regulations.gov/comment/FTC-2021-0076-0017>; Letter from Rep. Randy Feenstra (“Rep. Feenstra”) (Jan. 19, 2022), at 1, <https://www.regulations.gov/comment/FTC-2021-0076-0020>; Letter from Donald Marean of Lindon Farm (“Marean”) (Jan. 14, 2022), at 1, <https://www.regulations.gov/comment/FTC-2021-0076-0041> (lack of a fee-structure makes it improper to comment on racetrack safety program); Okla. Comm’n at 2 (Authority has not submitted a cost analysis); ARCI at 2–5 (critiquing lack of information in proposed rule about costs making it impossible to fully comment on rules); Letter from Wash. Horse Racing Comm’n (Jan. 17, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0009> (stating that it needed a cost analysis for the entire program before it can fully provide substantive comments on the rules).

<sup>18</sup> See Tex. Comm’n at 3; Letter from Fla. Dep’t of Bus. & Prof. Reg. (“Fla. Dep’t Bus.”) (Jan. 19, 2022), at 3, <https://www.regulations.gov/comment/FTC-2021-0076-0034>.

participants; it recommended that the government instead consider public safety grants or cooperative agreements rather than preempting the states' ability to regulate its licensees.<sup>19</sup> The Florida Business Department stated that budgeting issues are its main concern when determining how it will meet the new HISA regulatory requirements.<sup>20</sup> The Association of Racing Commissioners International asked the Commission to withhold its decision until it had received all of the Authority's proposed rules and to not make findings piecemeal.<sup>21</sup> Relatedly, the Oklahoma Commission took issue with the lack of proposed bylaws of the Authority: "The FTC should request the bylaws from HISA and publish them along with the proposed rules for comment."<sup>22</sup>

These commenters' desire to evaluate all possible proposed rules at once, including the rule outlining the methodology for assessing fees, is understandable, but it is not the process that Congress chose in the Act. Instead, piecemeal consideration is baked into the Act. For example, the Act requires that this Racetrack Safety rule be in effect "120 days before the program effective date" of July 1, 2022. 15 U.S.C. § 3056(c)(2)(A). The rule establishing a methodology for assessing fees to fund the Authority, by contrast, has to be in effect "90 days before the program effective date." *Id.* § 3052(f)(1)(C)(i). Other rules must be in effect "no later than the program effective date." *See, e.g., id.* §§ 3055(a)(1), 3056(a)(1). The Act also speaks in the singular in requiring the Authority to submit to the Commission "any proposed rule, or proposed modification to a rule," in identifying 11 different types of proposed rules. *Id.* § 3053(a). Plainly, Congress had in mind seriatim rule review, and not without reason—to consider every eventually proposed rule at once would prove a difficult burden for the Authority, the Commission, and

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<sup>19</sup> *See* Letter, Texas Commission, at 1.

<sup>20</sup> *See* Fla. Dep't Bus. at 3.

<sup>21</sup> *See* ARCI at 2–3.

<sup>22</sup> Okla. Comm'n. at 1.



members of the public alike. This first published proposed rule alone produced a voluminous and robust comment record.

These commenters' desire to know the Authority's methodology for assessing fees while they appraise the Racetrack Safety rule, however, is a reasonable one; the Commission notes that the Assessment Methodology proposed rule for determining fees was just recently published in the Federal Register,<sup>23</sup> so it was not formally available in its final-proposal form during the comment period on Racetrack Safety.<sup>24</sup> Notwithstanding these reasonable desires, the Commission does not see a timing-based reason to disapprove the Racetrack Safety proposed rule because the Authority was directed to establish its initial Racetrack Safety rule first—120 days before July 1, 2022—whereas it was directed to establish its Assessment Methodology rule only 90 days before July 1, 2022.<sup>25</sup> Still, the Authority may propose a modification to any rule at any point it deems necessary and appropriate. Accordingly, the Commission directs the Authority to review this initial Racetrack Safety rule and the initial Assessment Methodology rule (if approved by the Commission) and submit to the Commission proposed rule modifications to both rules within one year of this order. 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.<sup>26</sup> In this way, by considering an

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<sup>23</sup> See Fed. Trade Comm'n, *Notice of HISA Assessment Methodology Proposed Rule*, 87 Fed. Reg. 9,349 (Feb. 18, 2022).

<sup>24</sup> The Assessment Methodology was publicly available on <https://www.hisaregs.org> beginning on December 21, 2021. See 87 Fed. Reg. at 9,350.

<sup>25</sup> Compare 15 U.S.C. § 3056(c)(2)(A) (“120 days before the program effective date”), with *id.* § 3052(f)(1)(C)(i) (“90 days before the program effective date”).

<sup>26</sup> In the unlikely event that, one year from now, the Authority has no changes that it wants to propose to either the Racetrack Safety rule or the Assessment Methodology 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.

update to Assessment Methodology at the same time it considers modifications to Racetrack Safety, the Authority will be able to conduct a full examination of both sides of the “cost” and “benefit” ledger at the same time.

The Oklahoma Commission’s stated concern about the lack of public comment on the Authority’s bylaws, while raising a seemingly valid concern, ultimately lacks merit. It is true that the Act explicitly lists bylaws: “[A]ny proposed rule, or proposed modification to a rule, of the Authority relating to—(1) the bylaws of the Authority,” among ten other categories of proposed rules or rule modifications, must be submitted to the Commission. *Id.* § 3053(a). The Authority was incorporated and had bylaws in effect as of September 30, 2020, even before the passage of the Act in December 2020—after all, the Act did not *create* the Authority but “recognize[]” it. *Id.* § 3052(a). The Authority’s bylaws, under which it continues to operate, were adopted on September 30, 2020.<sup>27</sup> Congress enshrined in the Act provisions that already existed in the Authority’s bylaws, such as the requirement that there be five independent directors and four industry directors from various equine constituencies. *See id.* § 3052(b)(1). It would be anomalous if Congress, while enshrining the Authority’s bylaws in the Act, simultaneously rendered inoperable those bylaws until such later time as they could be approved by the Commission. Because the Authority’s bylaws predated the Act, and because the Act enshrined provisions of those pre-existing bylaws, the Commission understands the passage of the Act to have functioned as approval of the Authority’s bylaws then in effect; the inclusion of bylaws in § 3053(a)(1) means only that any future *proposed modifications* to the bylaws must be published for public comment and subject to the Commission’s approval before they take effect.

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<sup>27</sup> *See* Bylaws of Horseracing Integrity & Safety Auth., Inc. (Sept. 30, 2020), <https://www.hisaus.org/s/HISA-Bylaws.pdf>.

Consequently, consistent with the text of the Act, this requirement applies to any future proposed modifications to the Authority's bylaws.

**a. Rule 2010—Definitions**

The Authority proposed a series of definitions to be applied to the Rule 2000 Series, many of which restated or were based on the Act's definitions.<sup>28</sup> A few proposed definitions elicited comments.

Several commenters criticized the Authority's definition of *bled*.<sup>29</sup> Oklahoma questioned whether the term requires visual epistaxis only or an endoscopic exam.<sup>30</sup> Several commenters were concerned that the term implicated only exercise-induced pulmonary hemorrhage ("EIPH") level 4 (the highest severity level) because failure to include EIPH levels 1 through 3 in the definition could be under-protective of the health and safety of horses.<sup>31</sup>

The California Horse Racing Board stated that the definition of *Covered Horse* should include horses in 2-year-old training sales.<sup>32</sup>

The Texas Commission objected to the definition of *Covered Horserace* as inappropriately reaching purely intrastate commerce.<sup>33</sup>

The California Horse Racing Board remarked that the proposed definition of *Covered Persons*<sup>34</sup> does not clearly indicate whether "employees of such persons and other horse support

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<sup>28</sup> 15 U.S.C. § 3051.

<sup>29</sup> The Authority defined *bled* to mean where "blood from one or both nostrils of a Horse has been observed after exercise." Proposed Rule 2010, 87 Fed. Reg. at 445.

<sup>30</sup> Okla. Comm'n at 3.

<sup>31</sup> See Nat'l Horsemen at 4; Rep. Feenstra at 1; Marean at 2.

<sup>32</sup> See Cal. Bd. at 2 (providing suggested rule amendment). The California Board was responding to the Authority's comment in the Notice that "[t]he Act gives HISA authority over Covered Horses. Horses do not become Covered Horses until they have completed their first official work as defined by the Act, thus two-year-old horses offered in sales do not fall under the jurisdiction of HISA." 87 Fed. Reg at 443.

<sup>33</sup> Tex. Comm'n at 3.

<sup>34</sup> The proposed rule defines *Covered Persons* to mean all Trainers, Owners, breeders, Jockeys, Racetracks, Veterinarians, and Persons 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.

personnel” include personnel who were never previously licensed.<sup>35</sup> The Oklahoma Commission commented that this definition lists breeders but that no state licenses breeders.<sup>36</sup>

The California Horse Racing Board stated that it is unclear whether the proposed definition of *Groom*<sup>37</sup> includes personnel such as horseshoers, stable employees/hotwalkers, and exercise riders.<sup>38</sup>

The Oklahoma Commission queried whether the definitions of *Owner* and *Trainer* intentionally omitted their need to be licensed.<sup>39</sup>

The Indiana Horseracing Commission commented that proposed rules used terminology inconsistently and provided two examples of what it viewed as conflicting or confusing terminology.<sup>40</sup> The Florida Horsemen’s Benevolent and Protection Association raised concerns about the definition of *Responsible Person*, which “should be expanded to include the Trainer or Manager at the farm or training facility when the horse is not at the racetrack.”<sup>41</sup>

The Jockeys’ Guild suggested that the definition of *Jockey* should include a rider of a Covered Horse in Covered Horserace, as well as training of a Covered Horse at a Covered Racetrack, so that training hours are included; it also recommended that the term “exercise rider” be included in the definitions because they are distinct from jockeys.<sup>42</sup>

The Authority responded to the various comments about definitions with a mix of defending certain definitions, typically because they are provided by the Act, as well as openness

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<sup>35</sup> See Cal. Bd. at 2.

<sup>36</sup> See Okla. Comm’n at 3.

<sup>37</sup> *Groom* is defined as meaning a “Covered Person who is not an Owner, Veterinarian, Trainer, or assistant Trainer but is involved in the care of a Covered Horse.”

<sup>38</sup> See Cal. Bd. at 2.

<sup>39</sup> See Okla. Comm’n at 3.

<sup>40</sup> See Letter from Indiana Horseracing Commission (“Ind. Comm’n”) (Jan. 19, 2022), at 1, <https://www.regulations.gov/comment/FTC-2021-0076-0027>.

<sup>41</sup> See Fla. Horsemen at 2.

<sup>42</sup> See Jockeys’ Guild at 3.

to refining other definitions in proposed rule modifications in the future.<sup>43</sup> In the former camp fall the definitions of *Covered Horse*, *Jockey*, and *Trainer*, which the Authority states “are set forth” in the Act and “that definition is controlling.”<sup>44</sup> By contrast, with respect to the contention that the definition of *Claiming Race* was unclear, the Authority was persuaded that it could do better: “The Racing Safety Committee will address this comment in future modifications of the rule.”<sup>45</sup> The Authority did not address the Florida Horsemen’s proposal for *Responsible Person*, but the Commission notes that the advantage of the definition of the proposed rule is that it identifies a single “responsible person” at any one time (Owner before first Workout; Trainer once in training; Owner again if training ceases); the Florida Horsemen’s proposal could create ambiguity about which one person is the Responsible Person if many people could be at any one time. The definition of *bled* received extensive treatment in the Authority’s Response. The Authority agreed that only level 4 of EPIH, the most severe form, is covered by its definition of *bled*: “blood from one or both nostrils of a Horse has been observed after exercise.” The Authority contended that covering less severe forms of EPIH in its definition of *bled*, such as through requiring endoscopic examinations of every covered horse after every covered race, would be “impractical.”<sup>46</sup>

The Commission finds that the Racetrack Safety proposed rule’s definitions are consistent with the Act. The Commission agrees with the Authority that many of the definitions of interest to commenters are provided by the Act itself, and no commenter identified a definition in the proposed rule that conflicts with a definition in the Act. Generally, the fact that a definition could be sharper or clearer is unlikely to result in a finding that its deficiency constitutes a

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<sup>43</sup> See Authority’s Response at 5–6.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 6.

conflict with the Act. The Commission would welcome a proposed rule modification that updates *Claiming Race* and any other definitions that experience reveals to be inadequate.

As for the definition of *bled*, which is not defined in the Act, the Authority's proposal to focus principally on the most-severe level of EPIH, which is visible to the human eye, instead of less-severe levels, the detection of which requires substantially more technology and time, finds no apparent inconsistency with any requirement of the Act. Still, if the Commission were presented with information that persuaded the Commission that a program of systematically detecting less-severe levels of EPIH were "*necessary* to protect the health and safety of covered horses," it may issue an interim final rule. 15 U.S.C. § 3053(e) (emphasis added). No such showing has been made to the Commission.

**b. Rule Series 2100—*Racetrack Safety Accreditation Program***

In Rule Series 2100, the Authority proposes to establish a mandatory national accreditation program for all U.S. racetracks that conduct Covered Horseraces (as defined in the Act).

**1. Rule 2110 et seq.—*Accreditation Process***

In Rule 2110 et seq., the Authority proposes a phased-in approach to granting Racetrack Safety Accreditation, initially allowing interim or provisional accreditation; if full compliance is not met, the Authority provides provisional accreditation to a racetrack so long as it engages in good-faith efforts to achieve full compliance. Both the California Horse Racing Board and the Jockeys' Guild stated that the Authority should clarify the entity responsible for ensuring racetrack compliance with the safety standards in the accreditation process.<sup>47</sup> The California Horse Racing Board also recommended that the rule provide that state racing commissions

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<sup>47</sup> See Jockeys' Guild at 3; Cal. Bd. at 1.

should meet or exceed proposed regulatory standards to allow states to maintain stricter requirements.<sup>48</sup> The Jockeys' Guild raised concerns about the standards being used at racetracks automatically granted "interim Racetrack Safety Accreditation" by the Authority.<sup>49</sup> The Texas Commission asserted that the Rule 2110 accreditation process "is designed to put State racetracks out of business" and that accreditation is not a national issue but rather is governed by state regulatory authorities.<sup>50</sup>

The Authority responded that Rule 2112 makes clear that the Authority's Racetrack Safety Committee, which is required by the Act, oversees the accreditation process.<sup>51</sup> As for the possibility of suspending accreditation in emergency situations, the "comment will be taken into consideration by the Authority and the Racing Safety Committee in the future and may be addressed in future proposed rules."<sup>52</sup> The Authority is also open to reviewing information submitted by state racing commissions in evaluating accreditation, but it does not believe that it can compel such information.<sup>53</sup> The Authority also anticipates providing additional guidance about proposed Rule 2115's requirement of a "satisfactory annual report" from accredited racetracks.<sup>54</sup>

The Commission finds that the accreditation process of Rule 2110 et seq. is consistent with the Act. The provisions of Rule 2110 et seq. track closely with the statutory language of 15 U.S.C. § 3056(c)(2). Commenters did not identify any aspect of these provisions of the proposed rule that is inconsistent with the Act. The Commission will welcome future proposed rule modifications that the Authority decides to submit in response to the useful comments received.

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<sup>48</sup> Cal. Bd. at 1.

<sup>49</sup> Jockeys' Guild at 3.

<sup>50</sup> Tex. Comm'n at 4.

<sup>51</sup> See Authority's Response at 7.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> See *id.* at 7.

<sup>54</sup> See *id.*

## **2. Rule 2120 et seq.—Accreditation Requirements**

In Rule 2121, the Authority proposes a Racetrack Safety and Welfare Committee, headed by the Regulatory Veterinarian, to review the circumstances around fatalities, injuries, and racetrack safety issues with the goal of identifying possible contributing risk factors that can be mitigated. The California Board stated that the rule did not clarify for whom the Committee worked or to whom it answered or how the Committee would be funded.<sup>55</sup> The Florida Business Department raised concerns about possible ethical conflicts between the Committee and state racing commissions.<sup>56</sup> The Jockeys' Guild believed that the Committee should include a "jockey representative," in addition to the jockey, in order to have centralized communications with an organization such as itself.<sup>57</sup> Another commenter raised questions about personnel evaluating track safety and recommended that it be done by medical professionals not directly involved in racing to provide an outside perspective.<sup>58</sup> NAARV stated that the Committee fails to include an Attending Veterinarian, which it claimed would act as the best advocate for horses.<sup>59</sup>

In its response, the Authority stood by its proposal for the Committee. As for the absence of a requirement that a jockeys' representative or an Attending Veterinarian be members of the Committee, the Authority noted that a racetrack may include both on its Committee but that the minimum membership requirements ensure balance and broad representation. Further, "the Racetrack Safety and Welfare Committee is responsible for convening a meeting with the connections of the applicable Covered Horse, which includes the attending veterinarian."<sup>60</sup> It also stated that racetracks would fund the Committee and that the Committee would answer to,

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<sup>55</sup> Cal. Bd. at 2.

<sup>56</sup> Fla. Dep't Bus. at 2.

<sup>57</sup> Jockeys' Guild at 4.

<sup>58</sup> Letter from Anonymous (Jan. 19, 2022), [FTC-2021-0076-0038], <https://www.regulations.gov/comment/FTC-2021-0076-0038>.

<sup>59</sup> NAARV at 3.

<sup>60</sup> Authority's Response at 8.



and inform the work of, the Authority.

The Commission finds that proposed Rule 2120 et seq. is consistent with the Act. No commenter identified a provision of the Act that is inconsistent with any provision of proposed Rule 2120 et seq., even as many advanced policy arguments for a different composition of the Racetrack Safety and Welfare Committee. The Authority's baseline requirements for the Committee membership, which may be supplemented by individual racetracks as they see fit, form a useful starting point for operationalizing the safety and welfare programs found elsewhere in the provisions of the proposed rule.

**3. Rule 2130 et seq.—Required Safety Personnel: Safety Director**

In Rule 2130 et seq., the Authority proposes to designate personnel responsible for overseeing risk assessment, risk management, enforcing Authority regulations, overseeing racehorse safety, and interacting with the Authority for Racetrack Safety Accreditation compliance. The Oklahoma Horse Racing Commission criticized these rule provisions as altering or creating positions in an unclear manner and imposing significant costs for the state agency and its veterinarians.<sup>61</sup> The Indiana Commission raised similar concerns about conflicting federal and state regulatory responsibilities by creating new personnel positions without understanding who had responsibility for resolving rule violations.<sup>62</sup> As for Rule 2131 (Safety Director), the Minnesota Racing Commission stated that the reporting of equine fatalities within 72 hours is fine, but injuries may take longer to appear so deserve a longer reporting window.<sup>63</sup> The Jockeys' Guild expressed concerns that the duties assigned to the "Safety Director" are overly broad, as it is unrealistic for one individual to have all the necessary qualifications, including

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<sup>61</sup> Okla. Comm'n at 3.

<sup>62</sup> Ind. Comm'n at 4.

<sup>63</sup> Letter from Minnesota Racing Commission ("Minn. Comm'n") (Jan. 19, 2022), at 8, <https://www.regulations.gov/comment/FTC-2021-0076-0029>.

knowledge of veterinarian medicine, racetrack safety, risk management, and injury prevention.<sup>64</sup>

Both the Washington Commission and Texas Commission stated that this position would duplicate activities already performed by state officials.<sup>65</sup>

As for Rule 2132 (Medical Director), the Jockeys' Guild recommended that the rule be expanded so that the Medical Director "oversee[s] the care and organization of the medical needs of covered persons and invitees while on covered racetracks," and not just jockeys.<sup>66</sup> It further recommended that the Medical Director be a licensed, insured, board-certified physician trained in family practice or in a specialty area such as internal medicine, emergency medicine, or surgical specialties such as orthopedics, neurosurgery, or trauma.<sup>67</sup> A second commenter suggested that the proposed rule's requirement that the Medical Director "[c]oordinate and oversee a comprehensive plan for transportation of an injured rider to the nearest Trauma Level One or Two facility" might conflict with West Virginia's existing scheme,<sup>68</sup> while a third believed rule sub-sections 12 and 13<sup>69</sup> do not belong because they are unrelated to jockey and other worker safety.<sup>70</sup>

As for Rule 2133 (Stewards), the California Board said that the provisions should cover contractors and not only employees.<sup>71</sup> As for Rule 2134 (Regulatory Veterinarian), the California Board inquires, "Why does the Authority use total handle as opposed to starts as the metric in

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<sup>64</sup> Jockeys' Guild at 4.

<sup>65</sup> Letter from Wash. Horse Racing Comm'n ("Wash. Comm'n") (Jan. 17, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0009>; Tex. Comm'n at 4.

<sup>66</sup> Jockeys' Guild at 4.

<sup>67</sup> *Id.*

<sup>68</sup> Letter from Anonymous [FTC-2021-0076-0038], at 2.

<sup>69</sup> *See* Notice, 87 Fed. Reg. at 448 ("(12) Develop in writing, subject to annual review and revision as necessary, the Racetrack's Emergency Action Plan, which shall include readiness for medical needs of racing participants, workers, and spectators; (13) Work with local, State, and Federal regulators to standardize the approach and response to pandemic-related issues among riders, workers, and spectators.").

<sup>70</sup> *See* Letter from Anonymous (Jan. 10, 2022), at 2 [FTC-2021-0076-0005], <https://www.regulations.gov/comment/FTC-2021-0076-0005>. This anonymous commenter also otherwise praised these provisions of the proposed rules: "Appreciate the update and very well written." *Id.* at 1.

<sup>71</sup> *See* Cal. Bd. at 2-3.

this instance?”<sup>72</sup> The Florida Business Department criticized the rule as vague and seemingly allowing a state to employ only one veterinarian.<sup>73</sup> As to Rule 2135 (Responsibilities and Duties of Regulatory Veterinarian), the California Board said that the Regulatory Veterinarian should be empowered to require diagnostic imaging before a horse is placed on the Veterinarians’ List and wonders how the Regulatory Veterinarian will work with state racing commissions in practice.<sup>74</sup> Finally, as for Rule 2136 (Racetrack Safety Officer), the Jockeys’ Guild said that the duties currently assigned to the individual as the “Racetrack Safety Officer” are overly broad and unrealistic, as it is unlikely that the individual is going to have all the necessary qualifications; rather, the Safety Officer should work with individuals who are properly trained in each of the respective areas.<sup>75</sup> Another commenter remarked that the rule is silent as to who pays the officer and to whom the officer reports.<sup>76</sup>

The Authority reiterated its belief that it struck the right balance with the required personnel and their roles. As for the objection that the Safety Director will have too much on her plate, the Authority noted that she need not perform all of the tasks but rather oversee them: “The Safety Director is not required to personally perform all activities concerning safety and risk management and injury prevention.”<sup>77</sup> With respect to the contention that the Medical Director should ensure the safety not only of jockeys but also of others, the Authority is open to the suggestion in future rule modifications: “The Racetrack Safety Committee focused on the medical care of jockeys who are at high risk of injury and had no standardized medical care among racing jurisdictions. Coverage of other individuals may be considered in the future by the

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<sup>72</sup> *Id.* at 3.

<sup>73</sup> Fla. Dep’t Bus. at 2.

<sup>74</sup> *See* Cal. Bd. at 3.

<sup>75</sup> Jockeys’ Guild at 5.

<sup>76</sup> *See* Letter from Anonymous (Jan. 10, 2022), at 1 [FTC-2021-0076-0005], <https://www.regulations.gov/comment/FTC-2021-0076-0005>.

<sup>77</sup> Authority’s Response at 10.

Authority.”<sup>78</sup> As for comments suggesting more qualifications (board certification) or fewer qualifications (paramedics) for the Medical Director, the Authority believes that it struck the right balance but is open to future revisions: “These comments address areas that are deserving of further review by the Authority after the initial implementation of the Safety Rules.”<sup>79</sup> The Authority’s Response also clarifies that Stewards include contracted as well as employed Stewards and that they enforce only the Authority’s rules when the state has not entered into an agreement with the Authority but both the Authority’s and state’s rules when the state has.<sup>80</sup>

Turning to the Regulatory Veterinarian, the Authority defended its choice of handle for compensation “because wagering handle influences the ability of racetracks to generate income, whereas a reimbursement formula based on starts could penalize smaller racetracks that do not have the ability to generate wagering handle income.”<sup>81</sup> As for diagnostic testing, it is not “always useful,” but the proposed rule provides “discretion to require further diagnostic testing for removal from the Veterinarians’ list.”<sup>82</sup> The Authority likewise expounded on the differences between the Safety Director and the Safety Officer in terms of qualifications and roles.<sup>83</sup>

The Commission finds that Rule 2130 et seq. is consistent with the Act. Establishing clear roles such as Safety Director, Medical Director, Steward, Regulatory Veterinarian, and Safety Officer that are required for a racetrack to achieve and maintain its accreditation materially advances the Act’s requirement of establishing “safety and performance standards of accreditation for racetracks.” 15 U.S.C. § 3056(c)(2)(A)(i). No commenter identified a provision of the proposed rule that is inconsistent with any provision of the Act, although many

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 11–12.

<sup>81</sup> *Id.* at 12.

<sup>82</sup> *Id.* at 13

<sup>83</sup> *See id.* at 13–14.

commenters made constructive suggestions for improvements that the Authority will consider in future proposed rule modifications.

**4. Rule 2140 et seq.—Racehorse Inspections and Monitoring**

In proposed Rules 2141–2142 (Racehorse Veterinary Inspections and Assessments), the Authority requires that racehorses be inspected by regulatory veterinarians several times to identify and isolate unfit horses. Rule 2143 requires that inspections by a veterinarian determine that horses be found to be in good health and vaccinated for transmissible and life-threatening diseases before they enter a racetrack. The proposal is intended to enhance racehorse, jockey, and racetrack welfare by promoting horse health and avoiding catastrophic injuries.

The Minnesota Racing Commission stated that 72 hours is too short to adequately identify horse injuries (which the Safety Director must do under Rule 2131(c)(7)), as it often takes 2–3 weeks for full diagnosis to be confirmed.<sup>84</sup> PETA commented that bone injuries cannot be identified by simply observing horses and that current technologies can detect bone issues without anesthetizing horses.<sup>85</sup> PETA recommended that each racetrack have an onsite pharmacy to monitor medication use and prevent abuse, a standard practice in Hong Kong.<sup>86</sup> The Texas Commission stated that veterinary inspections (the subject of proposed Rule 2142) and racehorse monitoring (the subject of proposed Rule 2143) are currently enacted as state rules without the need for federal intervention.<sup>87</sup> The Indiana Commission took issue with the veterinarians' ability to scratch horses rather than merely recommend a scratch to a steward and questioned whether the increased record-keeping will provide utility without greater cooperation among

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<sup>84</sup> See Minn. Comm'n at 22.

<sup>85</sup> See PETA at 2.

<sup>86</sup> See *id.* at 5.

<sup>87</sup> See Tex. Comm'n at 4.

jurisdictions and veterinarians.<sup>88</sup>

The Authority unequivocally wants veterinarians and not stewards to scratch horses: “[T]he Regulatory Veterinarian has the authority to scratch a horse. It is not a recommendation to the stewards. The stewards are required to comply with this unconditional authority. The Authority believes this unconditional authority establishes and will maintain a culture of safety at the racetrack.”<sup>89</sup> That this responsibility lies with the Regulatory Veterinarian rather than the Attending Veterinarian (employed by the Owner or Trainer) helps avoid “a conflict of interest.”<sup>90</sup> As for PETA’s suggestion of additional on-site detection technology, the Authority is open to exploring such requirements in the future but thinks that they currently have a “high cost/benefit ratio.”<sup>91</sup> So too with the suggestion that proposed Rule 2142(d) swap “may place” for “shall place” for the Veterinarians’ List for horses identified as at-risk during training: Such a swap “could potentially enhance racehorse safety, [so it] will therefore be considered in future modifications of the rules.”<sup>92</sup> With respect to the asserted need for better technology to facilitate sharing of the data gathered while monitoring horses, the “Authority is planning to develop technological applications to assist in reporting and compliance.”<sup>93</sup>

The Commission finds that Rule 2140 et seq. is consistent with the Act. It creates a sensible process for identifying potential health deficiencies and monitoring horses to ensure their safety and that of their riders. It will require significant implementation efforts to make the proposed rule’s provisions work in practice, which the Authority recognized in its responses, and it may be improved with time and experience. In any event, no commenter identified any way in

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<sup>88</sup> See Ind. Comm’n at 4.

<sup>89</sup> Authority’s Response at 14–15.

<sup>90</sup> *Id.* at 15.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 17.

<sup>93</sup> *Id.*

which the proposed rule provisions on racehorse inspections and monitoring was inconsistent with the Act.

**5. Rule 2150 et seq.—*Racetrack and Racing Surface Monitoring and Maintenance***

The Authority’s proposed Rule 2150 et seq. requires that racetracks be designed, configured, tested, maintained, and monitored to optimize the racing surface for safety of the racehorse and jockey. Both the Oklahoma Horse Racing Commission and the Jockeys’ Guild complained that this section fails to adequately explain the rail requirements and could prove too expensive.<sup>94</sup> The Animal Welfare Institute commented that dirt tracks commonly used in the United States are less safe than turf or synthetic surfaces used on European tracks and increase the likelihood of horse injuries; it criticized the Authority for removing a provision in an earlier draft proposal that would have required racetracks to consider installing synthetic racing surfaces.<sup>95</sup>

The Authority replied that data will drive its decisions: “The Authority and the Racetrack Safety Committee believe that surface monitoring via data collection is critical in identifying factors that contribute to equine injuries. The Authority has reduced the specific information required to be collected and reported to the Authority to those items most impactful to surface monitoring and most common to current racetrack practices. The Authority plans to develop electronic applications that will speed and facilitate the process for racetracks to report data. The Racetrack Safety Committee plans to issue Guidance to address compliance with these rules.”<sup>96</sup> The suggestion to require synthetic surfaces could come in the future, but for now the Authority “considered [it] premature without sufficient data.”<sup>97</sup> The Authority is also open to

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<sup>94</sup> Okla. Comm’n at 4; Jockeys’ Guild at 5.

<sup>95</sup> See Animal Welfare Inst. at 2–3.

<sup>96</sup> Authority’s Response at 18.

<sup>97</sup> *Id.*

“consider[ing] whether future rule modifications should include the mandatory use of lights and siren and whether personnel responsible for activating the system should be designated by the Racetrack Safety Rules or the Racetrack.”<sup>98</sup>

The Commission determines that proposed Rule 2150 et seq. is consistent with the Act. Racing surfaces and surrounding physical features such as rails and gaps play key roles in safety for horses and humans alike, as the Act recognized in suggesting “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).” 15 U.S.C. § 3056(b)(3)(B). Although an eventual requirement that racetracks install artificial racetrack surfaces could be warranted by data collection, the Authority’s decision not to require artificial racetrack surfaces at this point is not inconsistent with the Act. No commenter identified any other inconsistency as between these proposed rule provisions and the Act.

#### **6. Rule 2160 et seq.—Emergency Preparedness**

The Authority’s proposed Rule 2160 et seq. includes accreditation requirements that racetracks sufficiently undertake various emergency preparedness steps regarding catastrophic injuries, fire safety, hazardous weather, infectious disease outbreaks, and emergency drills. One commenter stated that tracks have found modified SUVs or similar vehicles to be better able to provide care on racetracks than standard ambulances that drive poorly on racetracks.<sup>99</sup> Racetrack Medical Professionals raised concerns about the proposed provisions regarding EMS, credentialed persons, and incident response procedures and recommended that medical advisors

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<sup>98</sup> *Id.* at 19.

<sup>99</sup> See Letter from Anonymous (Jan. 18, 2022) [FTC-2021-0076-0012], <https://www.regulations.gov/comment/FTC-2021-0076-0012>.



form a sub-committee to properly implement appropriate racing safety practices.<sup>100</sup> The Texas Commission commented that emergency procedures in proposed Rule 2160 are currently enacted as state rules without the need for federal intervention.<sup>101</sup> Comments were also received stating that the proposed procedures involve “return to play” considerations, which may be outside of most EMS training and against some states’ licensing medical practice; one commenter suggested that concussion-management protocols be developed and maintained by trained providers and that a safety committee be established to develop these recommendations.<sup>102</sup> Another commenter believed proposed rules covered most situations except for EIPH, stating that it is a serious concern since 80% of horses in training bleed from their lungs, and recommended that race day LASIX treatment not be prohibited since LASIX is the best treatment for EIPH.<sup>103</sup> Comments also stated that portions of the proposed rule conflicted with West Virginia trauma and EMS requirements and suggested clarifying the rule to require the presence of Advanced Life Support during activity hours.<sup>104</sup>

The Authority expressed openness to improving these rules as data and experience indicate.<sup>105</sup> No comments were received on Rule 2161 (Emergency Drills) or Rule 2163 (Fire Safety), and the remaining proposed rule provisions received suggestions ranging from a scrivener’s error<sup>106</sup> (which is corrected in the final version of this Racetrack Safety rule) to the Advanced Life Support suggestion, which the Authority will consider in future rule

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<sup>100</sup> Letter from Racetrack Medical Professionals (Jan. 19, 2022), at 2–3, <https://www.regulations.gov/comment/FTC-2021-0076-0037>.

<sup>101</sup> See Tex. Comm’n at 4.

<sup>102</sup> Letter from Anonymous (Jan. 18, 2022) [FTC-2021-0076-0011], <https://www.regulations.gov/comment/FTC-2021-0076-0011>.

<sup>103</sup> See Letter from Jim Prendergast (Jan. 18, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0016>.

<sup>104</sup> Letter from Anonymous, at 2 [FTC-2021-0076-0038].

<sup>105</sup> See Authority’s Response at 19–22.

<sup>106</sup> In proposed Rule 2165, the word “symptoms” should actually be the word “signs.”

modifications.<sup>107</sup> As for who will be responsible for reporting accidents, the Authority noted that proposed Rule 2167 puts the onus on the racetracks and that submissions of such data to the Authority will be made in accordance with forthcoming Authority guidance.<sup>108</sup>

The Commission determines that Rule 2160 et seq. is consistent with the Act. Emergencies present a huge risk to the safety of racing participants, and planning for the most common of them, from hazardous weather to fire to loose horses, advances the Act's goals. The required presence of equine and human ambulances with adequate staffing provides an immediate safety improvement, while the proposed rule's emphasis on data collection is vitally important for increasing safety over time. No commenters identified any way in which the proposed rule's provisions are inconsistent with the Act.

#### **7. Rule 2170—Necropsies**

The Authority's proposed Rule 2170 requires that a necropsy (i.e., equine autopsy) be performed on all horses that die or are euthanized at covered racetracks and training centers, outlines the kinds of necropsies acceptable to the Authority, unifies necropsy examination standards, and requires the reporting of examination results. The Animal Welfare Institute strongly favors this rule, asserting that collecting data from necropsies is critical to showing how track conditions can cause injuries.<sup>109</sup> The Kentucky Horse Racing Commission raised concerns about the inability to determine the root cause of a horse's death from field necropsies as well as payment issues.<sup>110</sup>

The Authority expressed openness to strengthening Rule 2170 moving forward. As for

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<sup>107</sup> See Authority's Response at 20–21.

<sup>108</sup> See *id.* at 21.

<sup>109</sup> See Animal Welfare Inst. at 2.

<sup>110</sup> Letter from Kentucky Horse Racing Commission (“Ky. Comm’n”) (Jan. 18, 2022), at 1, <https://www.regulations.gov/comment/FTC-2021-0076-0015>.

the concern about field necropsies: “The rule addresses situations in which there is no appropriate facility available and the only veterinarian with the expertise to carry out a necropsy is the attending veterinarian. The requirements of Rule 2170 are a part of Racetrack accreditation. Ultimately, the Racetrack is responsible for compliance and cost. However, if other parties are currently paying for these costs, there is no prohibition on those parties incurring the cost.”<sup>111</sup>

The Commission finds that Rule 2170 is consistent with the Act. Like other data-gathering mechanisms, identifying the cause of death of a horse is the first step at preventing other horses from suffering the same fate, so requiring necropsies to be done in as effective a way as possible will further the Act’s goals. No commenter identified an inconsistency between the proposed rule’s necropsies provisions and the Act.

#### **8. Rule 2180 et seq.—*Safety Training and Continuing Education***

The first part of the Authority’s proposed Rule 2180 et seq. requires that participating state racing commissions use a uniform, national trainer’s test as part of the requirements for a person to become a trainer, while the second part requires persons responsible for racehorse or racetrack management to take continuing education. Both the National Horsemen and U.S. Rep. Randy Feenstra of Iowa stated that the Authority violated the Act by delegating its educational responsibilities to state racing commissions.<sup>112</sup> The Washington Horse Racing Commission stated that the national trainer test would be difficult to implement because state rules vary on issues not covered in the Act and suggested that the HISA test be part of, but not made to substitute for, each state’s test.<sup>113</sup> The Association of Racing Commissioners International

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<sup>111</sup> Authority’s Response at 23.

<sup>112</sup> See Nat’l Horsemen at 3; Rep. Feenstra at 1.

<sup>113</sup> See Wash. Comm’n at 1.

recommended that a uniform, national trainer's test be removed from the Authority's responsibilities.<sup>114</sup>

In its response to the Washington Commission's concerns, the Authority replied that the "accreditation requirement is subject to a State racing commission entering into a voluntary agreement with the Authority. If a state elects to enter into such an agreement, it may revise its own rules, if necessary. The Authority plans to issue Guidance to the state racing commissions regarding the National Trainers Test before the effective dates of the Racetrack Safety Rules."<sup>115</sup> The Authority also clarified that the two hours of continuing education for jockeys is required annually, not before each meet.<sup>116</sup> As for its plans to develop continuing education with respect to states that do not enter into an agreement with the Authority: "In the future and consistent with the Act, the Authority is planning to propose rules relating to a program of research and education." Moreover, the Authority plans to "issue Guidance that will address the development of centralized education resources, the funding and development of education resources, and compliance monitoring. The Guidance will also provide guidelines for the use of on-line courses. For purposes of clarity, future proposed rules will clarify that courses for certain covered persons must be available in both English and Spanish, and that those covered persons may take the course in their preferred language."<sup>117</sup>

The Commission finds that proposed Rule 2180 et seq. is consistent with the Act. For these provisions, unlike for most others, commenters did attempt to identify an inconsistency between the proposed rule and the Act, namely that, by allegedly "delegating its educational

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<sup>114</sup> See ARCI at 5; see also Minn. Comm'n at \_\_\_; Cal. Bd. \_\_\_.

<sup>115</sup> Authority's Response at 24.

<sup>116</sup> See *id.*

<sup>117</sup> *Id.*

responsibility,”<sup>118</sup> the Authority is in violation of 15 U.S.C. § 3056(b)(11), which requires that the Authority’s racetrack safety program “include . . . [p]rograms relating to . . . education.” But the Act expresses no “non-delegation” principle; indeed, many of its operational provisions are premised on a dynamic federalism featuring the voluntary cooperation of state racing commissions and the Authority under the Commission’s oversight. Proposed Rules 2181 and 2182 both begin with this phrase: “Subject to the applicable State Racing Commission electing to enter into an agreement with the Authority , . . .” It is perfectly consonant with the Act to provide, in the rule, mechanisms for state racing commissions to elect to perform educational functions. Such provisions meet the very definition of “[p]rograms relating to . . . education.” 15 U.S.C. § 3056(b)(11). 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. *See id.* § 3056(a)(1) (“[A]fter notice and an opportunity for public comment in accordance with section 3053 of this title, the Authority shall establish a racetrack safety program . . .”). Of course, inasmuch as the Act permits the Authority to modify any rule, after notice and opportunity for public comment in accordance with § 3053, the Authority could modify this portion of the rule in the future. In any event, proposed Rule 2180 et seq. has no demonstrated inconsistency with the Act.

### **9. Rule 2190 et seq.—Jockey Health**

In Rule 2190 et seq., the Authority proposes rules to protect the health of jockeys,

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<sup>118</sup> Rep. Feenstra at 1.

including drug and alcohol testing and a concussion-management program. The Jockeys' Guild recommended that most of the requirements proposed for jockeys should apply to all licensees and, in particular, that all racing officials and licensees should undergo drug and alcohol testing.<sup>119</sup> In addition, as for Rule 2192, the Jockeys' Guild recommended that there be a unified, national concussion-management protocol with return-to-ride guidelines created by medical experts in concussions and that the return-to-ride guidelines apply for all jockey injuries and not just concussions.<sup>120</sup>

The Authority defended the proposed rule as an important first step, but it allowed that an “expansion of testing to include additional covered persons may be considered by the Racetrack Safety Committee in the future.”<sup>121</sup> As for the need for a unified, national concussion-management protocol, the Authority agrees: “The Racetrack Safety Committee generally concurs with these comments and concerns. Currently, different racetracks use different commercial products for concussion assessment. Guidance will be issued concerning accreditation assessments of racetrack concussion protocol implementation, and the Authority plans to develop a unified concussion/medical injury reporting system that will be made available to all Racetracks (in line with current consensus statements on concussion and injury in sports). Subsequent rules may be proposed to further refine jockey and exercise rider concussion and injury prevention and management processes.”<sup>122</sup>

The Commission finds that proposed Rule 2190 et seq. is consistent with the Act. The Act speaks of both “human and equine injury reporting and prevention.” 15 U.S.C. § 3056(b)(4). As with American football players and other athletes, jockeys face an acute risk of concussion,

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<sup>119</sup> See Jockeys' Guild at 8.

<sup>120</sup> *Id.* at 9.

<sup>121</sup> Authority's Response at 25.

<sup>122</sup> *Id.*

and adroitly managing those risks will improve human safety immediately and over the long term. No commenter identified any way in which proposed Rule 2190 et seq. is inconsistent with the Act.

**c. Rule Series 2200—Specific Rules and Requirements**

***1. Rules 2220–2230—Attending Veterinarian and Treatment Restrictions***

In proposed Rules 2220–2230, the Authority requires that only veterinarians licensed by the state racing commission can examine, diagnose, and treat racehorses and that the veterinarian is to work with the trainer (as the owner’s agent) to appropriately examine, diagnose abnormalities of, and treat racehorses. NAARV stated that requiring all treatment and procedures to be reported to the Authority creates an undue burden on participants.<sup>123</sup> Senator Diane Feinstein of California commented that Section 2230’s prohibition on an attending veterinarian’s contact with a horse 24 hours prior to a race should be strengthened to 48 hours before being approved.<sup>124</sup> An anonymous commenter raised concerns that horses stabled in a non-racing state would be treated by veterinarians in that state who are not licensed by a racing commission in that state because there is none.<sup>125</sup> A veterinarian criticized the program as preventing experienced veterinarians from treating horses using preventative medicine.<sup>126</sup>

The Authority stood by these provisions of its proposed rule, but it was open to Senator Feinstein’s suggestion: “After consultation with the Anti-doping Medication and Control Committee concerning its rule development, the Racetrack Safety Committee will consider a rule modification to extend the time period from 24 to 48 hours.”<sup>127</sup> It also expressed openness to

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<sup>123</sup> See NAARV at 1.

<sup>124</sup> See Sen. Feinstein at 2.

<sup>125</sup> See Letter from Anonymous (Jan. 13, 2022) [FTC-2021-0076-0006], <https://www.regulations.gov/comment/FTC-2021-0076-0006>.

<sup>126</sup> See Letter from Maurice Casey (Jan. 20, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0033>.

<sup>127</sup> Authority’s Response at 26.

considering a requirement for on-site central pharmacies at racetracks and minor wordsmithing to proposed Rule 2230(a) in future proposed rule modifications.<sup>128</sup>

The Commission finds that Rules 2220–2230 are consistent with the Act. Setting clear standards for attending veterinarians and clear treatment restrictions will advance the Act’s goals of improving the health and welfare of racehorses. No commenter identified any way in which the proposed Rules 2220–2230 are inconsistent with the Act.

## **2. Rule 2240 et seq.—Veterinarians’ List**

Proposed Rule 2240 et seq. establishes a list of horses that have compromised health or unsoundness and prohibits these horses from racing; it also describes the process by which the horse is determined to have recovered from its illness or unsoundness and may return to racing. The Animal Welfare Institute commented that it wanted the Authority to ensure that all information on the Equine Injury Database would be publicly available.<sup>129</sup> The Kentucky Horse Racing Commission expressed concern that, under proposed Rule 2240, a horse that had not started in over 365 days would not be identified to the Stewards until it had entered a race.<sup>130</sup> NAARV stated that, contrary to traditional practice, the proposed rule permits an Attending Veterinarian to determine that a horse is unsound and thus placed on the Veterinarians’ List, which could be based on minor, non-critical reasons, lead to over-reporting to the Authority’s database, and prematurely end a racehorse’s career.<sup>131</sup> NAARV also contends that there is no basis in Rule 2241(d) to necessarily place an ill horse on the Veterinarians’ List for seven days and that the Attending Veterinarian should determine how long a horse should be off after an

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<sup>128</sup> See *id.* at 26–27.

<sup>129</sup> See Animal Welfare Inst. at 1.

<sup>130</sup> See Ky. Comm’n at 1.

<sup>131</sup> See NAARV at 3.



illness.<sup>132</sup>

The Authority recognized some practical difficulties in implementing the Veterinarians' List at the outset and stated that it “plans to issue Guidance on this section of the rule and will develop technological means to assist in identifying horses that fall within this rule.”<sup>133</sup> As for the concern that non-critical unsoundness issues will unfairly land some horses on the Veterinarians' List, the Authority found it unlikely: “Horses with noncritical unsoundness issues are not normally entered in a race and are identified during training; such horses would not likely be identified for placement on the Veterinarians' List in the course of examinations conducted pursuant to Rule 2142. Therefore, Rule 2240 encourages the appropriate management of horses with noncritical unsoundness issues by trainers.”<sup>134</sup> Responding to concerns that the durations a horse stays on the Veterinarians' List are inappropriate, the Authority defended its choices as providing the appropriate balance of safety and deterrence to the otherwise powerful financial incentives to enter an unsound horse into a race.<sup>135</sup> The Authority also agreed with a commenter who identified a scrivener's error, which will be fixed in the approved rule.<sup>136</sup>

The Commission finds that proposed Rule 2240 et seq. is consistent with the Act. Having a Veterinarians' List ensures that horses for which a race could exacerbate an illness or injury are not subjected to the heightened risk. It is explicitly contemplated by 15 U.S.C. § 3056(b)(5). No commenter identified any way in which the proposed Rule 2240 et seq. is inconsistent with the Act.

### **3. Rule 2250 et seq.—Racehorse Treatment History and Records**

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<sup>132</sup> *Id.*

<sup>133</sup> Authority's Response at 27.

<sup>134</sup> *Id.*

<sup>135</sup> *See id.* at 28–30.

<sup>136</sup> The word “or” in proposed Rule 2242(b) will be “and” in the approved rule.

The Authority’s proposed Rule 2250 et seq. requires attending veterinarians and trainers to report all medications, treatments, surgical procedures, and off-racetrack exercise history for all covered horses to the Authority’s database. NAARV complains about “the need for all veterinary treatments to be reported to the Authority (presumably under Rule 2251(b)),” because it is assertedly based on a misreading of a research paper about corticosteroid joint injections, which NAARV then claims cannot “be construed as supporting any contribution of corticosteroid joint injections to catastrophic injuries of race horses.”<sup>137</sup> NAARV also contends that requiring “all treatments, procedures, feeding and training methods to be reported to the Authority” imposes “a huge burden” and “expense” on “participants of the sport,” which “far exceeds” any benefits provided and could result in participants being less likely to provide necessary information about the care of their horses.<sup>138</sup>

The Authority’s response contends that proposed Rule 2250 is vital to its work: “Data from medical records is essential to determining risk factors for injuries and medical conditions in racehorses. This data will be useful in developing strategies for identifying horses at high risk of injury or illness and strategies for injury and illness prevention. The data will allow the Authority to perform one its core functions in the Act—to perform research and education on safety.”<sup>139</sup> The Authority was open to commenters’ suggestions for improvements, including that racetracks maintain records for horses shipping interstate to the racetrack for 30 days.<sup>140</sup>

The Commission finds that proposed Rule 2250 et seq. is consistent with the Act. As with other provisions of the Racetrack Safety proposed rule, the collection and maintenance of accurate data, here about individual horses, is the first step toward improving the health and

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<sup>137</sup> See NAARV at 1.

<sup>138</sup> See *id.* at 2–3.

<sup>139</sup> Authority’s Response at 30.

<sup>140</sup> See *id.* at 31.

safety of those and other horses. Previously, information about horses that crossed state lines to race was especially difficult to put together to achieve improvements in horse health and safety. No commenter identified any provisions of proposed Rule 2250 et seq. that is inconsistent with the Act.

#### **4. Rule 2260 et seq.—Claiming Races**

In Rule 2260 et seq., the Authority proposes to regulate the practice by which a horse entered into a race may be purchased for a claiming price by a new trainer/owner as soon as the horse leaves the starting gate.<sup>141</sup> Rule 2262(c) voids the transfer whenever the horse becomes injured, compromised, or dies after the race. Rule 2261 requires the transfer of records about the horse for the 60 days prior to the claiming race from the previous owner or trainer to the new owner or trainer. Rule 2262 provides the conditions by which an owner or trainer for a horse entered into a claiming race can opt to declare the horse ineligible to be claimed. As the Authority described the rationale for these provisions, they provide “disincentives to a trainer/owner to enter a horse compromised from latent injury or ailment in a race with the intent for another trainer/owner to take responsibility by claiming the horse in the race.”<sup>142</sup>

Several comments were received regarding the transfer of claimed-horse records under Rule 2261,<sup>143</sup> with many expressing concern about state-law protections for veterinary confidentiality as it relates to the transfer of records set forth in Rule 2261.

Rule 2262’s void-claim provisions generated a similarly robust set of responses.<sup>144</sup> The Texas Racing Commission objected to the rule’s providing that title to a claimed horse be vested

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<sup>141</sup> See Notice, 87 Fed. Reg. at 446 (in particular proposed Rule 2262(a)).

<sup>142</sup> *Id.* at 440.

<sup>143</sup> See Cal Bd. 6–7; Ky. Comm’n at 2; ARCI at 8–9; Thoroughbred Horsemen at 4–7; Minn. Comm’n. at 30–31.

<sup>144</sup> See Ky. Comm’n at 2; National Horsemen at 3; NAARV at 2; Wash. Comm’n at 1; Thoroughbred Horsemen at 27; Letter of N.J. Racing Comm’n., at 2 (Jan. 18, 2022), <https://www.regulations.gov/comment/FTC-2021-0076-0043>.

when the horse leaves the starting gate, as that would incentivize riders to get a horse of questionable soundness to run the race. In Texas, title is transferred when the horse “steps on to the racetrack.”<sup>145</sup> The Washington Commission stated that “claiming” is not a racetrack-safety issue but rather a method of transferring ownership.<sup>146</sup>

Both the National Horsemen and the Oklahoma Commission expressed concerns about the length of delay (often two weeks or longer) for post-race test results to validate or invalidate the sale.<sup>147</sup> The National Horsemen commented about the ambiguity in the rule as to the ownership of the horse during this interim period.<sup>148</sup>

NAARV criticized the proposed rule’s requirement that a determination that the horse is unwell or lame to void a sale occur within one hour of the race under Rule 2261(c) because, it asserts: (1) horses suffering some serious types of injuries (such as incomplete cannon bone fractures) do not show that they are lame within one hour of a race but often exhibit such injuries the following day; (2) merely jogging a horse before the Regulatory Veterinarian for this determination within an hour of the race can actually increase the risk of serious injury; and (3) horses suffering only a superficial wound can appear lame within an hour of a race.<sup>149</sup>

As for Rule 2263 (Waiver Claiming Option),<sup>150</sup> a commenter stated that waving a claim should not be included in Rule 2263, as it is more of a race condition than a safety or health issue.<sup>151</sup> Conversely, the Thoroughbred Horsemen commented about proposed Rule 2260 et seq.’s Claiming Races provisions, expressing concern about the Authority’s decision to omit any

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<sup>145</sup> See Tex. Comm’n at 5.

<sup>146</sup> See Wash. Comm’n at 1.

<sup>147</sup> See Nat’l Horsemen at 3; Okla. Comm’n at 4.

<sup>148</sup> See Nat’l Horsemen at 3.

<sup>149</sup> NAARV at 2.

<sup>150</sup> Here commenters also identified a scrivener’s error: What was published as a second “Rule 2262” should have been “Rule 2263”; the error is treated in this Order as corrected. See Authority’s Response at 33.

<sup>151</sup> See Letter from Anonymous, at 2 [FTC-2021-0076-0005].

limitation on the purse-to-claim ratio (which had been in an earlier draft proposal). The lack of any such limitation, they claimed, will incentivize trainers to enter infirm horses in claiming races with greater profit potential due to the differential between the horse's value and the purse, thereby increasing the likelihood of catastrophic injury.<sup>152</sup>

The Authority acknowledged that it had removed the purse-to-claim-price ratio that was contained in earlier drafts of the Racetrack Safety proposed rule. It stated, however, that the proposed rule's provisions "do not prohibit racetracks and racing jurisdictions from implementing" their own "rules regarding purse to claim price ratio."<sup>153</sup> It further recognized that it would continue to study the issue and consider addressing it in future rule modifications. As to privacy, the rule's requirements applicable to the entry of horses subject to being claimed in a Claiming Race will be noticed upfront.<sup>154</sup> The Authority defended the Racetrack Safety Committee's proposal for a 60-day period as based on scientific research showing that high-intensity exercise in the previous 60 days of activity is a risk factor for catastrophic injury and that returning to training after more than 60 days of inactivity also may result in catastrophic injury.<sup>155</sup> The Authority also stated that the rules protect the safety and welfare of horses by preventing an unfit horse from being entered into a claiming race simply to get sold off in light of the fact that research shows that horses that are entered into claiming races are more likely to suffer catastrophic injuries.<sup>156</sup>

As for a commentator's concern that not all horses vanned off are unsound but that proposed Rule 2262(c)(3) voids a claim if "the Horse is vanned off of the racing track by

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<sup>152</sup> See Letter from Alan M. Foreman, The Thoroughbred Horsemen's Associations, Inc. et al. ("Thoroughbred Horsemen") (Jan. 19, 2022), at 4–7, <https://www.regulations.gov/comment/FTC-2021-0076-0024>.

<sup>153</sup> Authority's Response at 4.

<sup>154</sup> See *id.* at 31.

<sup>155</sup> See *id.* at 32.

<sup>156</sup> See *id.* at 33.

discretion of the Regulatory Veterinarian,” the Authority’s Racetrack Safety Committee agreed that the concern is worth further consideration.<sup>157</sup> The reason that horses that are vanned off the racetrack, particularly for a non-injury related issue (*e.g.*, overheating, fatigue, etc.), will be given consideration in the rule, and the Racetrack Safety Committee will consider this comment in future modifications of the rule.

The Commission finds that no commenter raised a plausible argument that proposed Rules 2261, 2262, and 2263 do not comply with the Act’s requirements. The rules regarding claiming races are designed to facilitate the fair sale of horses in claiming races and the related transfer of the horse’s records, while also providing sufficient safeguards under Rule 2262(c) and Rule 2263 to protect horse safety and health by voiding the sale of ill or lame horses, or horses that have not raced in four months, to minimize the risk of a catastrophic injury. The Commission therefore finds that the rules are consistent with the Act’s provisions, in particular those governing the humane treatment of covered horses, the oversight and movement of covered horses, the prevention of injuries, the use of pre- and post-race inspections, and the use of a veterinarians’ list under 15 U.S.C. § 3056(b)(2) and (4).

These findings include approval of the Authority’s decision to drop (at least temporarily) a limit on the purse-to-claim ratio given the multiple ways a claim can be voided under Rule 2262(c), the other safeguards described above, and its determination that its Racetrack Safety proposed rules do not preclude local racetracks and racing jurisdictions from enacting their own rules placing limitations on the purse-to-claim ratio. The Commission agrees with that preemption assessment and therefore finds that the lack of a purse-to-claim price limitation in the proposed racetrack safety rules is not inconsistent with the Act.

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<sup>157</sup> *See id.* at 32.

***Rule 2270 et seq.—Prohibited and Restricted Practices for Safety and Health of Horses***

***i. Rule 2271—Prohibited Practices***

The Authority’s proposed Rule 2271 prevents the abuse of racehorses by preventing the masking of pain that allows horses to train and race while injured and by preventing the stimulation of pain to coerce racehorses to perform beyond their athletic potential.

The Commission received several comments about this rule. The Indiana Commission asked whether Rule 2271(a) includes all blocking agents and asked for more information about what constitutes a counter-irritant or blistering agent under Rule 2271(d).<sup>158</sup> The Minnesota Commission opined that Rule 2271(f)’s limitation on the use of “electro-shock” devices is ambiguous given the prohibition on devices delivering “an electric shock” in Rule 2271(e).<sup>159</sup> The Kentucky Commission suggested that the time limits in Rule 2271(f) be reduced from 48 hours to 24 hours.<sup>160</sup> And the Texas Commission stated that there is no need for this rule because state commissions or boards already possess the authority to issue their own prohibited practices rules under state law.<sup>161</sup>

In response to the specific concerns or questions raised in the comments, the Authority stated that: (1) the 48-hour ban in proposed Rule 2271(f) is appropriate to ensure that the effects of some procedures that alleviate pain are no longer clinically significant, and that it does not believe that the difficulty of detection varies significantly between a 24-hour period and a 48-hour period; (2) under 2271(a), any physical or veterinary procedure used to mask the effects or signs of injury for the purpose of allowing training or racing of a horse with an injury to the detriment of the horse’s health and welfare is prohibited and “veterinary procedures” include

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<sup>158</sup> See Ind. Comm’n at 4.

<sup>159</sup> See Minn. Comm’n at 31.

<sup>160</sup> See Ky. Comm’n at 2.

<sup>161</sup> See Tex. Comm’n at 6.

nerve blocks; (3) while Rule 2271(d) is appropriate as written, the phrase “counter-irritant effect” will be studied further and if necessary a future rule modifications will be considered; and (4) the “electrical shock” devices referenced in 2271(e) are distinct from the “electrical medical therapeutic devices” referenced in 2271(f).<sup>162</sup>

The Commission finds that proposed Rule 2271 is consistent with the Act. Section 3056(b)(2) requires that a horseracing safety program include “[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).”<sup>163</sup> Rule 2271 is just the sort of list of “prohibited practices” contemplated by § 3056(b)(2). As for the comment by the Texas Commission, Congress has determined the need for uniform national health and safety standards and protocols for the horseracing industry and has imbued the Authority with the power to enact rules necessary to implement racetrack safety standards and to protect the health and safety of horses, including lists of “prohibited practices.”<sup>164</sup> State laws that differ as to the same subject matter are therefore preempted by the Act.

**ii. Rule 2272—Shock Wave Therapy**

In proposed Rule 2272, the Authority proposes the regulation of shock wave therapy, which provides mild relief for the treatment of bone, tendon, and ligament injuries but could allow horses to train and race while injured, resulting in a career-ending or catastrophic injury. Rule 2272(a) regulates the use and disclosure of the therapy; Rule 2272(b) imposes suspensions for veterinarian and trainers who fail to report the use of shock wave therapy as required in 2272(a).

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<sup>162</sup> Authority’s Response at 33–34.

<sup>163</sup> 15 U.S.C. § 3056(b)(2).

<sup>164</sup> *See id.* §§ 3052(a), 3056(a).



Numerous comments were received about Rule 2272. The Jockeys' Guild recognized the importance and benefits of shock wave therapy but cautioned that unauthorized treatment is extremely dangerous for horses and riders.<sup>165</sup> NAARV asserts that the Authority failed to provide scientific support for Rule 2272(a)(3), which requires a 30-day waiting period after shock wave therapy to race again. NAARV claims that, to the contrary, "scientific research" shows that horses experience only analgesia (which is not numbing) for 1–2 days after such therapy (NAARV fails to provide a citation to any report or study substantiating this claim).<sup>166</sup> One commentator suggested that the term "workout" should be substituted for the use of the undefined term "breeze" in Rule 2272(a)(3).<sup>167</sup>

Another commentator pointed out that 2272(a)(1) requires disclosure 48 hours prior to use, while 2272(a)(2) requires disclosure within 48 hours of treatment. The commentator suggests requiring the disclosure of shock wave therapy at any time prior to use and notes that veterinarians often do not know that shock wave treatment will be necessary 48 hours in advance of the treatment.<sup>168</sup> One commentator opposed the suspension of a veterinarian for a first offense violation of the rule under Rule 2272(b).<sup>169</sup> Finally, another commentator stated that studies have determined that the analgesic effect of shock wave therapy lasts no more than 5 days and suggested that a 10-day stand down time for racing and breezing is more than adequate to protect a Covered Horse, while allowing access to an effective treatment that can replace more invasive therapies prohibited under HISA rules.<sup>170</sup>

The Authority responded to these comments as follows: (1) It agreed that the term

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<sup>165</sup> See Jockeys' Guild at 10.

<sup>166</sup> See NAARV at 1–2.

<sup>167</sup> See Cal. Bd. at 7.

<sup>168</sup> See Ky. Comm'n at 3.

<sup>169</sup> See Ind. Comm'n at 4.

<sup>170</sup> See Thoroughbred Horsemen at 13.

“workout” should be substituted for the undefined term “breeze” in Rule 2272(a)(3) and stated that its Racing Safety Committee will address this point in future proposed rule modifications; (2) it also agreed that the use of shock wave therapy should be disclosed at any time prior to use and that its Racetrack Safety Committee will address this comment in future rule modifications; and (3) the conflicting comments about the propriety of suspensions for first offenses reflect the divergent views on the appropriate penalties for failure to report shockwave therapy.<sup>171</sup> The Authority defended the penalties in Rule 2272(b) as sufficient and appropriate to deter the lack of reporting.<sup>172</sup>

In response to the comment that horses treated with Extracorporeal Shock Wave Therapy or Radial Pulse Wave Therapy should be added to the list of ineligible horses, the Authority essentially stated that the rules already require that: Proposed Rule 2272(a)(3) requires horses treated with shock wave therapy to be placed on the veterinarians’ list and not permitted to race or breeze for 30 days after treatment. Furthermore, proposed Rule 2240 states that a “Veterinarians’ List shall be maintained by the Authority of all Horses that are determined to be ineligible to compete in a Covered Horserace in any jurisdiction until released by a Regulatory Veterinarian.” Finally, in response to the comment about the limited duration of the analgesic effect of shock wave therapy and the recommendation for a shorter 10-day stand down time before resuming racing, the Authority noted that, while the analgesic effect of shockwave therapy is shorter than 30 days, some conditions that shockwave therapy is used to treat often require 30 or more days of rehabilitation. Accordingly, if the horse’s condition is severe enough to warrant shockwave therapy, the mandated a thirty day stand-down period allows for

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<sup>171</sup> See Authority’s Response at 34–35.

<sup>172</sup> See *id.* at 35.

rehabilitation of the underlying injury.<sup>173</sup>

The Commission finds that none of the comments challenged Rule 2272’s consistency with the Act. The Commission believes that the rule’s limited and restricted use of shock wave therapy—with both its therapeutic benefits but also potentially harmful effects—reflects a reasonable compromise of often-conflicting positions. The Commission determines that Rule 2272 is consistent with the Act, most notably § 3056(b)(2), which permits practices that are “consistent with the humane treatment of covered horses,” and § 3056(b)(5), which authorizes programs that use a veterinarians’ list, which Rule 2272(a)(3) imposes on any horse treated with shock wave therapy.

**iii. Rules 2273–2275—Devices**

The Authority proposes in Rules 2273–2275 to prohibit the use of any device meant to alter the speed or performance of a horse. No comments were received about these rules. The Authority accordingly provided no response. The Commission finds that the proposed rules’ treatment of the use of any device meant to alter the speed or performance of a horse is consistent with the Act and the FTC’s procedural rule.

**iv. Rule 2276—Horseshoes**

In proposed Rule 2276, the Authority proposes to limit the height of rims used as traction devices on forelimb and hindlimb horseshoes and to prohibit the use of any other traction device. NAARV stated that “existing scientific research” fails to support the Authority’s proposed ban on toe grabs on the hind shoes of horses where they provide necessary traction on dirt surfaces at the start of a race,<sup>174</sup> but NAARV provides no citations or support for that claim. The Florida Horsemen commented that full rims of 4mm or less should be permitted, in place of the proposed

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<sup>173</sup> See *id.*

<sup>174</sup> See NAARV at 2.

rule prohibiting the use of rims of 2mm or more.<sup>175</sup>

The Authority stated that its Racetrack Safety Committee notes that the increase in height of other traction devices increases risk of equine injuries and that therefore the height of the rims is limited to 2mm.<sup>176</sup>

The Commission finds that proposed Rule 2276 is consistent with the Act. Commenters did not address the Horseshoe rule's consistency with the Act. Rather, the comments challenge certain details in the Authority's choice of permitted horseshoes, but these are essentially policy disagreements. Section 3056(b)(2) of the Act allows "racing safety standards . . . consistent with the humane treatment of covered horses," which "may include . . . permitted and prohibited practices or methods."<sup>177</sup> The Commission notes that Rule 2276 is especially consistent with § 3056(b)(2) of the Act.

#### **6. Rule 2280 et seq.—Use of Riding Crop**

In Rule 2280 et seq., the Authority proposes the limited use of riding crops for safety and encouragement. This rule provision prompted many comments in favor and in opposition.

Animal-welfare groups recommended a complete ban on using the riding crop,<sup>178</sup> maintaining the proposed limit on using the crop to six times per race,<sup>179</sup> or increasing the penalties for rule violations because the current fines are too low to act as a deterrent,<sup>180</sup> and they generally expressed concerns about imposing a national standard that preempts state law because some jurisdictions currently prohibit cropping entirely.<sup>181</sup> Sen. Diane Feinstein stated that

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<sup>175</sup> See Fla. Horsemen at 3.

<sup>176</sup> See Authority's Response at 36.

<sup>177</sup> 15 U.S.C. § 3056(b)(2).

<sup>178</sup> See PETA at 4–5; Animal Welfare Inst. at 2.

<sup>179</sup> See Letter from Keith Dane, Senior Director, Equine Prot., The Humane Soc'y of the U.S., Humane Soc'y Legislative Fund, Humane Soc'y Veterinary Med. Ass'n (Jan. 19, 2022), at 1, <https://www.regulations.gov/comment/FTC-2021-0076-0030>.

<sup>180</sup> See Animal Welfare Inst. at 2.

<sup>181</sup> See *id.*

proposed Rule 2280 et seq. should be strengthened before being approved because the riding-crop provision as currently proposed could result in horses being struck more violently than is necessary.<sup>182</sup> The Texas Commission stated that Rule 2280 is unreasonable as it disqualifies racehorses based on the way the rider uses the crop.<sup>183</sup> The Jockeys' Guild expressed concerns about Rules 2280 and 2281 and asked that the Kentucky Horse Racing Commission's riding crop regulation be adopted by the Authority.<sup>184</sup> The Thoroughbred Horsemen supported proposed Rules 2280 and 2281 as providing necessary "limits on [the] use of riding crops in order to protect horses" but contended that Rules 2282 and 2283 failed to provide adequate enforcement measures to achieve that purpose and were inconsistent with 15 U.S.C. § 3056(b)(2).<sup>185</sup>

The Authority recognized that several comments about proposed Rules 2282 and 2283 contended that the penalties are not severe enough to deter violations of the riding crop rule,<sup>186</sup> while other commenters stated that the suspension and penalties imposed were excessive.<sup>187</sup> It added that the penalty system sufficiently discourages crop misuse by jockeys and dissuades owner and trainers from persuading jockeys to misuse the crop for financial gain. The Authority stated that helpful comments about Rules 2282 and 2283 would be further studied and addressed in future rule modification proposals.<sup>188</sup>

The Commission finds that proposed Rules 2282 and 2283 are consistent with the Act. In

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<sup>182</sup> See Sen. Feinstein at 2.

<sup>183</sup> See Tex. Comm'n at 6.

<sup>184</sup> Jockeys' Guild at 11.

<sup>185</sup> See Thoroughbred Horsemen at 7–9. Section 3056(b)(2) states that "[t]he horseracing safety program safety program shall include . . . [a] uniform set of training and racing safety standards and protocols consistent with the humane treatment of covered horses[.]"

<sup>186</sup> See, e.g., Thoroughbred Horsemen at 7–9.

<sup>187</sup> See Jockeys' Guild at 13–14.

<sup>188</sup> In particular, these comments: (1) asked, "if a horse is disqualified from purse earnings under either (b)(2) or (b)(3), how is it possible to also forfeit a percentage of the Jockey's portion of the purse?," see Jockeys' Guild at 14; (2) asked whether the suspension days are calendar or racing days, see Cal. Bd. at 8; and (3) noted that the rules fails to specify penalties for violations other than exceeding the number of strikes, see Thoroughbred Horsemen at 8.

particular, the proposed riding crop violations and penalties (including those for multiple violations) impose “[a] schedule of civil sanctions for violations” consistent with 15 U.S.C. § 3056(b)(8), and such sanctions are reasonable and substantiated. Further, the Commission determines that the proposed rules are also consistent with the Act’s requirement that the horseracing safety program include “[a] uniform set of training and racing safety standards and protocols consistent with the humane treatment of covered horses, *id.* § 3056(b)(2). This is because the rules impose sufficiently robust penalties and suspensions commensurate with the level of the riding crop violation, which should discourage the misuse of the crop for financial gain and thus deter riding crop violations in order to provide more “humane treatment of covered horses.” *Id.*

#### **7. Rule 2290 et seq.—Safety and Health of Jockeys**

In Rule 2290 et seq., the Authority proposes safety requirements for jockeys, including an annual physical examination and baseline concussion test (Rule 2291), the inclusion of medical-information cards in each jockey’s vest while riding (Rule 2292), and minimum safety equipment such as helmets and safety vests (Rule 2293).

Comments received for proposed Rule 2291 included the Thoroughbred Horsemen recommendation that the rule require concussion reporting across all racetracks (and not just to the racing commission in the state holding the race), as is currently done throughout the Mid-Atlantic region; it claimed that the Authority’s failure to consider cross-track reporting alternatives violated 16 C.F.R. § 1.142(a)(3).<sup>189</sup> Another recommended that the Racetrack Safety Committee review New York’s licensing requirements and rider medical fitness for incorporation into the rules.<sup>190</sup> The same commenter expressed the opinion that the rule should

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<sup>189</sup> See Thoroughbred Horsemen at 9–10.

<sup>190</sup> See Jockeys’ Guild at 14.

address exercise riders.<sup>191</sup>

The Jockeys' Guild provided the only comment on Rule 2292. It expressed support for the requirement that medical-information cards be attached to the rider's vest and urged that a centralized database be developed and utilized; it also suggested that the rule apply to all licensees and not only jockeys.<sup>192</sup>

The Kentucky Horse Racing Commission commented on Rule 2293, recommending that stewards not be required to inspect jockey's safety helmets and vests because jockeys are independent contractors responsible for ensuring the safety of their own equipment.<sup>193</sup>

The Authority noted, with respect to the comment received about Rule 2292, that a centralized database currently exists. Nonetheless, the Authority believes that the comments received concerning Rules 2291 and 2292 deserve further study and will be considered in any future rule modification.<sup>194</sup> As for Rule 2293, the Authority believes that stewards play an important and unique role in monitoring the use of approved equipment due to meetings stewards hold in most jurisdictions before a race in which they explain their expectations for safe riding with the jockeys. Their inspection of the safety vest and safety helmets are an integral component of that meeting and steward monitoring, the Authority asserts.<sup>195</sup>

The Commission finds that proposed Rule 2290 et seq. is consistent with the Act. Comments received as to these three proposed rule provisions failed to address whether they are consistent with the Act. In at least one instance, a commenter supported the proposed rule as following guidance provided in the Act.<sup>196</sup> In particular, the rules govern and implement

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<sup>191</sup> *See id.*

<sup>192</sup> *See id.* at 16.

<sup>193</sup> *See* Ky. Comm'n at 3.

<sup>194</sup> Authority's Response at 38.

<sup>195</sup> *Id.* at 39.

<sup>196</sup> *See, e.g.,* Thoroughbred Horsemen at 9 (stating that proposed Rule 2291 was adopted pursuant to guidance in 15 U.S.C. § 3056(b)(5), "which recognizes the importance of dealing with jockey concussions.")

procedures and polices relating to the health and safety of jockeys and thus implement the safety and health provisions in the Act. This includes most notably § 3056(b)(5) (requiring programs for injury and fatality data analysis, “that may include pre- and post-training and race inspections” and “concussion protocols”) and § 3056(b)(4) (requiring uniform “track safety standards and protocols,” including “rules governing . . . human . . . injury reporting and prevention.”). The Commission will welcome future proposed rule modifications that the Authority decides to submit in response to the useful comments received.

#### **d. Comments Unrelated to the Commission Determination**

The Commission received many comments that were unrelated to whether the proposed rule is consistent with HISA and with the Commission’s procedural rule, including many canvassed above. Others were unrelated to any particular rule provision and took issue with the Act more generally. In particular, several commenters contended that HISA is unconstitutional as violating a “private nondelegation doctrine,”<sup>197</sup> the Tenth Amendment (in theory by forcing the states to enforce and fund the Act), or other constitutional provisions.<sup>198</sup> Commenters also claimed that the proposed rules violated the Administrative Procedure Act,<sup>199</sup> although the Authority is not a government agency. Finally, some commenters complained about the negative impact HISA has inflicted on their states’ economies as a result of the transfer of regulatory oversight of the horseracing industry from the state to the Authority and the federal

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<sup>197</sup> See Tex. Comm’n at 2 (contending that the Act is unconstitutional as violating a private nondelegation doctrine implied by Article 1, Section 1 by granting regulatory authority to a private entity without any political accountability); NAARV at 1 (same); Nat’l Horsemen at 1; Okla. Comm’n at 1 (the Authority is not a federal agency and thus its actions are unlawful). NAARV filed an amicus brief supporting the suit in federal court against the Commission and the Authority seeking to declare HISA unconstitutional and enjoin its enforcement. See *Nat’l Horsemen et al. v. Black et al.*, No. 5:21-CV-00071-H (N.D. Tex. filed 2021).

<sup>198</sup> See Tex. Comm’n at 2 (also asserting the Act violates the Fifth Amendment’s Due Process Clause, Article II, and constitutional separation of powers).

<sup>199</sup> See Tex. Comm’n at 2.



government.<sup>200</sup>

The Commission will not address these comments because they do not relate to the statutory decisional criteria. Moreover, some of these complaints are currently being litigated in ongoing lawsuits over the Act. They are thus of no moment as to the narrow question before the Commission about whether to approve or disapprove the Racetrack Safety proposed rule.

For the preceding reasons, the Commission finds that the Horseracing Integrity and Safety Authority's proposed rule on Racetrack Safety is consistent with the Horseracing Integrity and Safety Act of 2020 and the Commission's procedural rule governing submissions by the Authority. Accordingly, the Racetrack Safety rule is APPROVED.

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<sup>200</sup> *See, e.g.*, Wash. Comm'n at 1.