

Introducing the Horseracing Integrity and Safety Act and a New Era of Racing Regulation

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The traditionally sedentary world of horse racing regulation was changed in momentous ways at the end of 2020. Congress passed, and the president signed, the Horseracing Integrity and Safety Act (HISA) as part of the huge omnibus Consolidated Appropriations Act, 2021.¹ The HISA is Title XII of Division FF of that legislation.² The program effective date of the legislation is July 1, 2022.³

Senate Majority Leader Mitch McConnell helped shepherd the bill through the 2020 Congress. Senator McConnell in previous years had indicated his opposition to a variety of versions of horseracing integrity bills, citing the position of Churchill Downs, the largest track and a major employer in McConnell's home state of Kentucky.⁴ In the summer of 2020, after Churchill Downs had agreed to support the legislation,⁵ he reversed course and introduced his own "Horseracing Integrity and Safety Act to recognize a uniform national standard for thoroughbred racing",⁶ because "in recent years, tragedies on the track, medication scandals, and an inconsistent patchwork of regulations have cast clouds over the future."⁷ The bill was designed "to provide Federal recognition and enforcement power to an independent Horseracing Integrity and Safety Authority"⁸ to govern thoroughbred racing.

The McConnell bill added a safety focus to the integrity legislation. Previously, the legislation had focused on drug uniformity and enforcement. There had been criticism that the integrity legislation failed to focus on the crucial issue of safety in horses. McConnell's bill gave the Authority control and authority over safety procedures and practices at racetracks.⁹

New York Congressman Paul Tonko consequently amended his Horseracing Integrity and Safety Act of 2020¹⁰ to conform to Senator McConnell's companion bill, and the amended bill passed the House by voice vote on September 29, 2020.¹¹ The full bill was folded into the Consolidated Appropriations Act, and passed by both houses.

The bill is the culmination of legislative efforts over a decade to bring a national uniform response to the problems of drugs and safety in thoroughbred racing. For much of the 21st century, public interest in the sport of thoroughbred racing has waned. Part of the change in consumer and fan interest in horse racing has been fueled by the perception that thoroughbred horse racing is dangerous to the health of both race horses¹² and to the riders participating in racing. Much of that perceived danger was due to the use of drugs in horses. This perception was further augmented by fatal injuries to horses who competed in the Triple Crown series of races.¹³ This was followed by the disclosure that the trainer of the 2008 Kentucky Derby winner Big Brown regularly treated his horses with anabolic steroids.¹⁴ In the 2010s, there were heavily publicized media accounts stressing the high breakdown rate of thoroughbred horses competing in the United States.¹⁵ Finally in 2020, as a result of a longstanding federal investigation, 27 individuals were charged – including some prominent thoroughbred trainers - with a conspiracy to drug their horses.¹⁶ "The indictments describe a network of assistant trainers, veterinarians, drugmakers and unidentified owners who, the feds say, conspired to circumvent authorities and illegally boost the performance of horses."¹⁷

The belief was that the existing regulatory setup featuring individual state racing commissions, each with differing rules, with limited State allocated budgets, with occasionally indolent levels of dedication to enforcing existing drug rules and employing drug testing facilities of varying levels of sophistication was not up to the enormous task of promoting safety and integrity in racing.

Earlier Legislative Reform Efforts

Federal efforts to unify and effectively enforce the drug rules in racing began with the Interstate Horseracing Improvement Act of 2011,¹⁸ which proposed to prohibit “entering a horse in a race that is subject to an interstate off-track wager if the person knows the horse is under the influence of a performance-enhancing drug; or (2) knowingly providing a horse with such a drug if the horse, while under the influence of such drug, will participate in a race that is subject to an interstate off-track wager.”¹⁹ This bill was followed by Horseracing Integrity acts of 2013,²⁰ 2015,²¹ 2017²² and 2019.²³ While the details of each changed over the years, the hallmark of these bills was the creation of an independent anti-doping organization which would establish and enforce uniform national rules on drugs. While these efforts never came close to passage, they raised both public and Congressional awareness of the problem of drugs in racehorses. In 2020, Congressman Paul Tonko’s Horseracing Integrity and Safety Act of 2020 attracted 261 co-sponsors.

Besides the opposition of Majority Leader McConnell, three general issues made it initially difficult to pass the Integrity bills. Horse racing’s leaders had for decades opposed the involvement of the federal government in horse racing. Racing’s mantra had previously been that: “States should have the primary responsibility for determining what forms of gambling may legally take place within their borders...The only role of the Federal Government should be to prevent interference by one State with the gambling policies of another and to protect identifiable national interests with regard to gambling issues.”²⁴ The Interstate Horseracing Act of 1978, which was supported by the racing industry, states emphatically:

The Congress finds that— (1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests.²⁵

Given racing’s leaders’ traditional belief that the federal government should steer clear of horse racing and gambling,²⁶ it was a difficult slog to convince people that the federal government should decide how racing would be regulated. On top of the fears of federal involvement, many elements of the racing industry did not want the private United States Anti-Doping Agency (USADA) to establish the drug rules for the sport.²⁷

Secondly, the legislation always had issues over what forms of horse racing should be covered. It was clear that thoroughbred racing would be covered (the leaders of the coalition in support of the legislation included the Jockey Club, the Thoroughbred Owners and Breeders Association, the International Federation of Horseracing Authorities, the Jockeys’ Guild and The Breeders’ Cup). The issue was whether quarter horse racing and harness racing would be included. Quarter

horse racing is a major sport in the western United States²⁸ and harness racing is a most significant force in the East and Midwest. New York State in 2019 ran more than two and a half times as many harness programs as thoroughbred programs.²⁹ Seventy-four percent of the races in New Jersey in 2019 were harness races.³⁰ Massachusetts and Maine only run harness programs. Traditionally, given the durability of its horses, harness racing has not presented the same level of safety issues as thoroughbred racing, and much of the harness racing establishment has not wanted to be included in the Integrity legislation.³¹ The issue for the Congress has been to what extent quarter horse and thoroughbred racing should be part of the legislation.

Finally, the main problematic issue has been the question of whether to prevent the use of the diuretic and anti-bleeding medication Lasix on race day. While other racing countries do not permit Lasix to be utilized on race day, jurisdictions in the United States have legalized it. By and large, the proponents of the Integrity Act have supported the elimination of race-day Lasix. The thoroughbred horsemen, on the other hand, have believed that race-day Lasix is necessary to protect the health of race horses. “Lasix proponents argue it is necessary as many horses bleed internally on the punishing American dirt surfaces. Several horsemen’s groups passionately believe that without Lasix many horses would struggle or not be able to run at all.”³²

Resolving the Controversial Issues

The legislation resolves the federalism issue by creating a mechanism under which the purview of drug use and safety will fall within a hodgepodge of government and non-governmental actors. The legislation recognized “the private, independent, self-regulatory, nonprofit corporation, to be known as the ‘Horseracing Integrity and Safety Authority,’ (Authority) ... for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program.”³³ In October 2020, the leading thoroughbred supporters of the Authority concept named a seven-member nominating committee, which would name the members of the Authority and its committees.³⁴ The Authority, in turn, is mandated to seek an agreement with USADA that will serve “as the anti-doping and medication control enforcement agency,”³⁵ but will not be responsible for prescribing drug rules. The Federal Trade Commission (FTC) serves as an oversight body for the Authority.³⁶ It has to approve the substantive and procedural rules of the Authority³⁷, ³⁸ and determines appeals from final decisions issued by the Authority.³⁹ Aside from state involvement in racing, there is also private control from the Authority and USADA, and overall federal governmental oversight of the private actors from the FTC.

The question of the coverage by the Authority of other breeds of horses is left to individual racing commissions or breed governing organization.⁴⁰ Either the racing commission or the breed organization has the power to elect to make harness racing and/or quarter horse racing to Authority control. If the United States Trotting Association agreed to Authority control, for example, all of American harness racing would be subject to regulation by the Authority.⁴¹ If either the racing commission or the breed organization elects to authorize Authority coverage, it must have a financing mechanism in place to pay for the Authority’s costs.

As to race day Lasix, the legislation reached a compromise. The Authority will conduct a study of the effect of Lasix on equine health.⁴² Lasix will be banned in all two-year-old races and in stakes events.⁴³ If a racing commission requests, the existing allowance in the state for Lasix can be continued for three years.⁴⁴ After the three-year period, only a unanimous vote from the Authority would continue the allowance for race day Lasix.⁴⁵

General Provision of the HISA

The nominating committee⁴⁶ is given the power to establish two committees: a Racetrack Safety Standing Committee and an Anti-Doping and Medication Control Standing Committee.⁴⁷ Most importantly, the nominating committee names the nine-member Authority Board of Directors. These committees and the Authority board each will have a majority of independent directors who are not from the racing industry. Additionally, there are conflict of interest standards put in place that should eliminate the possibility that individual Authority members will act in their personal financial interests.⁴⁸

The Racetrack Safety committee will focus on establishing and implementing a horseracing safety program, which would include racing surface standards, training and racing protocols, and could include rules governing whip use.⁴⁹ The Anti-Doping and Medication committee will advise and assist the Authority in establishing and implementing a medication control policy that will include uniform anti-doping and medication control rules.

The Authority will contract with USADA to enforce the anti-doping and medication control program.⁵⁰ Baseline drug rules will be the most stringent of a series of model rules of several non-governmental racing organizations.⁵¹ Other than the potential exemption for Lasix, medications and substances cannot be administered to horses within 48 hours of their next racing starts.

Future rules on medications and substances cannot, unless approved by the Authority and USADA, be less stringent than the baseline rules.⁵² Rulemaking is to start with the standing committees and then needs to be approved by the Authority and the FTC.⁵³

Enforcement is initially through the Authority, which will charge a violation of its rule and sanction the individuals.⁵⁴ The individuals charged can request a hearing with an administrative law judge of the FTC. After that decision, the charged individual can appeal to the full FTC.⁵⁵ FTC decisions can then be appealed to the federal courts.

The state racing commissions still have a potential role as well. The Authority may enter into an agreement with a state racing commission to implement the racetrack safety program or, with USADA, parts of the horseracing anti-doping and medication control program.⁵⁶

Constitutional Concerns

Given the opposition of some elements of the racing industry to HISA, it would not be surprising to believe that constitutional challenges will be made to the law. One likely form of the challenge will be to the incorporation of reference of the rules of the non-government organizations that are the baseline drug rules.⁵⁷ While there are issues of the propriety of delegating governmental

rulemaking to a non-government actor, there are bigger questions over the uncertainties of which of these non-governmental organizational rules will apply when there are conflicts between and among the rules. How does the non-governmental Authority pick and choose which rules to apply from the conflicting rules of various non-governmental actors? How can racing participants know which rules apply?

What becomes of the rules of the racing commission that appear to govern drug testing – not merely the substantive ones, but the procedural ones governing drug testing protocols? For example, a number of states mandate the drug testing of certain horses, including the winners of races. Does USADA’s jurisdiction nullify these non-substantive drug rules? Can we even tell whether these state rules on the time, place or manner of drug testing will apply to USADA’s drug testing procedures?

There will be anti-commandeering allegations akin to the violation of the anti-commandeering principle of 10th Amendment found in the Supreme Court decision invalidating the Professional and Amateur Sports Protection Act.⁵⁸ If the state racing commission elects to have another breed subject to HISA, it is commanded to provide a funding mechanism to cover the Authority’s costs.⁵⁹ If a state racing commission is to help enforce a component of an Authority program, it “may not implement such a component in a manner less restrictive than the rule, standard, or requirement established by the Authority.”⁶⁰ There are direct commands issued by the federal government to the states.

Additionally, there is the traditional constitutional argument that a private entity cannot exercise authority over a government licensee.⁶¹ The entire legislative scheme of HISA involves the private Authority and the private USADA exercising control over government licenses.

Fault Lines

Racing Commission Concerns

There is a near certainty that there will be conflicts between the Authority and the state racing commissions. HISA calls on the racing commissions to establish a mechanism to remit fees to the Authority.⁶² Apart from the issue of the authority of a racing commission to requisition fees, there would seem to be no political reason for a racing commission to establish a fee remission procedure. It would make total sense for the racing commission to let the Authority assess the fees.

The issue of whether a racing commission should opt to have other breeds of racing equines subject to regulation of the Authority raises a series of questions. Drug testing is traditionally the main expense of a racing commission. It encompasses veterinarians, equine medical directors, urine and blood collectors, and laboratories. Why would a state racing commission after giving up its thoroughbred laboratory responsibilities to the Authority, wish to set up its own separate harness or quarter horse laboratory? As harness track owner Jeff Gural has stated: “It is inconceivable that the state racing commissions are going to want to have two separate methods of regulating horse racing. The thoroughbreds regulated by the Feds and harness regulated by the

state. That will never happen and over time all of the states will opt in with or without our input.”⁶³

The Authority can contract out some of its responsibilities to individual racing commissions, but is there any incentive for a racing commission to accept this delegation? In fact, to what extent will racing commissions wish to stay in operation? Perhaps states will begin the process of deregulating racing, under which racetracks will take over much of the jurisdiction of racing commissions, and the commissions will be left to approvals under the Interstate Horseracing Act and procedural licensing matters.⁶⁴

The racing commissions maintain their power to determine the field of play rules governing the race. The goal is to set a level playing field for both competitors and bettors.⁶⁵ However, part of this task involves protecting safety and the riders of horses. There is considerable overlap between the rules of racing and health and safety concerns. The Authority is given jurisdiction over the use of whips. Have the racing commissions lost the power to punish riders for improper whip use? If a rider uses the whip to intimidate a competing horse, or - intentionally or carelessly - strikes another horse with a whip, will the state-authorized stewards retain jurisdiction over these incidents? The use of a battery or an electrical device to stimulate a horse can clearly affect both the outcome of the race and the safety of the horse, but is the use of a battery determined by the Authority or the racing commission? A jockey deliberately trying to injure another rider would seem to be a safety issue, but it can obviously affect the results of the race and has traditionally been one handled by stewards and racing commissions.⁶⁶ Is intentional rough riding now a federalized safety issue? Jockey alcohol and substance abuse issues surely affect racetrack safety, but human drug testing has apparently been left to the racing commissions. Racing commissions set standards for jockey helmets and jockey vests. Is this now a national issue? What is the line, if any, between the rules of the race and the issues of safety?

USADA Concerns

USADA regulation is subject to a number of potential issues. While the organization boasts of its work in combat sports, the organization has no experience with equines. It has utilized a therapeutic drug exemption for human athletes that is likely a far more expansive exception for date of competition use of drugs than the use of race day Lasix in horse racing.⁶⁷ For the championship fight between Floyd Mayweather, Jr and Manny Pacquiao in 2015, Mayweather received a retroactive exemption for IVs from USADA.⁶⁸

In 2018, the racing commissions tested 266,300 samples.⁶⁹ By contrast, USADA tested a total of 12,262 athletic samples in 2018⁷⁰ and 14,518 in 2019.⁷¹ Can USADA be ready by July 1, 2022? How does USADA go about accrediting laboratories in a field where it lacks expertise? The racing commissions have a general procedure of testing many horses after each race.⁷² Will USADA continue to perform the same level of post-competition testing, or will it rely far more on out-of-competition testing?

Jockey Club vice-chairman William Lear has suggested “that racing will likely adopt drug-testing policies that do away with requirements for every winner of every race to be tested for a wide variety of therapeutic and performance-enhancing substances. Nearly every major sport in

the world has moved in that direction, under a policy called ‘intelligence-based testing’ that combines mathematical analysis with boots-on-the-ground information gathering.”⁷³ Will “intelligence-based testing” be sufficient for the sport of racing, which held 36,207 thoroughbred races in America in 2019 with approximately 270,000 starters in those races?⁷⁴ American harness racing in 2019 held a similar number of races and an even higher number of runners.⁷⁵ It should be noted that the intelligence-based USADA testing in 2019 garnered a total of 533 tips, which produced a total of three announced sanctions involving non-analytical investigations.⁷⁶

Is United States drug testing that much subpar when compared to the rest of the world? The major indicted trainers from 2020 ran their best horses in Saudi Arabia and Dubai.⁷⁷ These jurisdictions have the funds to pay for the most advanced drug testing available. Yet, there were no drug positives on these horses.

FTC Concerns

The FTC has much bigger business to pursue than just racing. It has the enforcement or administrative responsibilities under more than 70 laws.⁷⁸ It enforces many more laws of greater consequence to the American economy than horse racing regulation. It has no animal welfare expertise, unlike the United States Department of Agriculture. Federal administrative proceedings are known to be time-consuming. In 2013, the hearing process for Social Security disability claims took 373 days, down from 542 in 2007.⁷⁹ By fiscal year 2020, the average processing time was still 386 days.⁸⁰ The median time from filing to trial in civil cases in federal courts is currently 28.6 months.⁸¹ Will the FTC be more dedicated to racing regulation than the state racing commissions?

Authority Concerns

With the addition of the “safety” element to the powers of the Authority, further concerns will emerge. Understanding what safety encompasses in racing is a daunting and often unfathomable problem. After numerous studies over several decades, does anyone know for certain whether Lasix hurts or harms horse health? Is there a way to determine what safe use of the whip is, as opposed to what looks best for public consumption? Is there a scientific basis to determine what the proper surface is for racing or what the proper training procedures are for horses? Will the “safety” elements follow science, or will they be equine alchemy, simply following the latest vogue?⁸²

While there is a concern over drug use in actual racehorses, the Authority’s power does not extend to breeding farms. A horse is not covered by HISA until its first timed and reported workout.⁸³ Therefore, if someone administers steroids or other powerful drug to a horse before the horse enters its cycle of racing, there is no penalty. The young horse is not covered by HISA. If racing is concerned about safety and drugs, it ought to extend the Authority’s powers to include young horses as well.⁸⁴

Similarly, the power to sanction violators of HISA’s rules is limited to “covered persons.”⁸⁵ “Covered persons” are defined as including racing licensees and their horse support personnel.⁸⁶ Yet horse can be drugged by anyone, not merely by covered persons. Bettors might want to

stimulate or sedate horses. Trainers frequently have enemies, and those enemies might wish to implicate these trainers by administering drugs that they know will be detected by regulators. Surely, the Authority should have the power to penalize anyone who violates its rules.

Conclusion

Most everyone can agree that this was the proper time for a change⁸⁷ in racing regulation. But will this be American racing's road to Damascus,⁸⁸ a top flight⁸⁹ assault⁹⁰ on racing's problems, or will this reform be close but no cigar?⁹¹ Maybe racing will regret⁹² this action as a sham.⁹³ Will racing commissioners give the devil his due⁹⁴ and enter into working agreements with the authority, or will they simply forego⁹⁵ dealings with the Authority? Will the Authority work as diligently as John Henry⁹⁶ to be a crusader⁹⁷ for racing interests, or will it just be a buck passer?⁹⁸ Will the constitutionality of HISA be affirmed?⁹⁹ It may be best to keep an open mind¹⁰⁰ on the future of racing regulation, but one should understand that upending the status quo in horse racing is always an upset.¹⁰¹

¹ Public Law No. 116-260 (2020).

² Id. [Title XII will subsequently be referred to as HISA.].

³ HISA § 1202. (14).

⁴ See Joe Drape, "A Call to Clean Up a Sport Is at Last Heeded," N.Y. TIMES, (Dec. 30, 2020); see also Tim Sullivan, "Obstacle Becomes Advocate," LOUISVILLE COURIER-JOURNAL, (Dec. 23, 2020).

⁵ After HISA passed, Churchill Downs president Bill Carstanjen stated, "This is a pivotal moment for the future of horseracing, a sport that will now be governed by world class, uniform standards across the United States." Press Release, "McConnell Leads Senate Passage of Horseracing Integrity and Safety Act," Office of Senator McConnell, (Dec. 30, 2020).

⁶ 166 Congressional Record, S5, 514 (daily ed. September 9, 2020).

⁷ Id.

⁸ Id.

⁹ See Kieran O'Sullivan, "Nothing Focuses the Mind Like the Threat of Extinction," SUNDAY INDEPENDENT, (Sept. 27, 2020).

¹⁰ H.R. 1754, 116th Cong.

¹¹ See Congressional Record, H4, 983, (daily ed. Sept. 29, 2020).

¹² A similar concern for animal safety has brought about a near end to the sport of greyhound racing. "In 2021, greyhound racing will take place at just four tracks in three states: Arkansas, Iowa and West Virginia. And only West Virginia, doesn't have a date for an expected phase out." Tracey McManus, "Greyhound Racing in Florida Ends Next Week," TAMPA BAY TIMES, (Dec. 14, 2020).

¹³ In 2006, Kentucky Derby winner Barbaro died as a result of an accident suffered in the Preakness Stakes. In 2008, Eight Belles broke down after finishing second in the Kentucky Derby and was given a lethal injection.

¹⁴ Jerry Bossert and Christian Red, "Brown's Legal Doping a Big Concern," N.Y. DAILY NEWS, (May 16, 2008).

¹⁵ See Walt Bogdanich, Joe Drape, Dara L. Miles and Griffin Palmer, "Mangled Horses, Maimed Jockeys," N.Y. TIMES, (March 25, 2012); Walt Bogdanich, Joe Drape, Dara L. Miles and Griffin Palmer, "Big Purses, Sore Horses, and Death," N.Y. TIMES, (April 30, 2012); John Cherwa, "Horse Racing; Horses' Deaths Raise Questions in Race Industry; Santa Anita Toll Hits 30," L.A. TIMES, (June 23, 2019). "The fatality rate in the United States is two and a half to five times greater per race start than the fatality rates in Europe and Asia." H. Rept. 116-554 at 17 (2020). [hereinafter House Report].

¹⁶ See "Manhattan U.S. Attorney Charges 27 Defendants in Racehorse Doping Rings," Press Release, U.S. Attorney's Office, Southern District of New York, (March 9, 2020). "Manhattan U.S. Attorney Charges 27 Defendants in Racehorse Doping Rings," USAO-SDNY Department of Justice]. The trainers included Jorge Navarro who won 30.7% of his races from 2017-2019 and Jason Servis, who won 30.1% of his races during that time period. Servis trained the horse Maximum Security, who was named the nation's top three-year-old colt in 2019. He won six of eight races. He finished first in the Kentucky Derby but was disqualified for interference.

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- ¹⁷ Robert Klemko, “The Rise and Fall of Jorge Navarro, The Alleged Doping King of Horse Racing,” WASHINGTON POST, (March 27, 2020).
- ¹⁸ H.R.1733, 112th Cong.; S.886, 112th Cong.
- ¹⁹ Congressional Research Service, Bill Summary for H.R. 1733, H.R.1733 - 112th Congress (2011-2012): Interstate Horseracing Improvement Act of 2011 | Congress.gov | Library of Congress.
- ²⁰ H.R.2012, 113th Cong., S. 973, 113th Cong.
- ²¹ H.R.2641, 114th Cong., There was also the Thoroughbred Horseracing Integrity Act of 2015, H.R.3084, 114th Cong. See generally Peter J. Sacopulos, “Pitts vs. Barr-Tonko Bills: An In-Depth Comparison of Proposed Anti-Doping Legislation in Horse Racing,” 9 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 37 (2016).
- ²² H.R.2651, 115th Cong.
- ²³ S.1820, 116th Cong. See also Racehorse Doping Ban Act of 2019, S.1488, 116th Cong.
- ²⁴ See *Gambling in America: Final Report of the Commission on the Review of the National Policy Toward Gambling* 2a. (1976).
- ²⁵ 15 U.S.C. § 3001, Public Law 95-515, 95th Cong.
- ²⁶ See Steven Crist, “Federal Threat Spurs Thoroughbred Drug Reform,” N.Y. TIMES, (Sept. 10, 1980). “Most ominous to the racing establishment, which overwhelmingly opposes the bill, it would bring racing under the regulatory jurisdiction of the Drug Enforcement Administration, an arm of the Justice Department.”
- ²⁷ Matt Hegarty, “Some Resistance, Questions Remain Despite McConnell’s Support of Federal Horse Racing Legislation,” *Daily Racing Form*, (Sept. 1, 2020).
- ²⁸ About one-third of states offer pari-mutuel wagering on quarter horses.
- ²⁹ New York State Gaming Commission, *2019 Annual Report*, available at <https://www.gaming.ny.gov/about/index.php?ID=3> [last viewed January 14, 2021]. Nationwide, there were 3,424 harness racing programs run in the United States in 2019. See United States Trotting Association, “U.S. Harness Racing Wagering and Purses up in 2019,” January 6, 2020, available at <http://ustrottingnews.com/u-s-harness-racing-wagering-and-purses-up-in-2019/> [last viewed January 22, 2021].
- ³⁰ New Jersey Racing Commission, *2019 Annual Report* 30 (2020).
- ³¹ See “Faraldo Issues Statement About USTA vs. HISA,” [Harnessracing.com](https://www.harnessracing.com/news/main/faraldo-issues-statement-about-usta-vs-hisa-10-25-2020), (Oct. 25, 2020), available at <https://www.harnessracing.com/news/main/faraldo-issues-statement-about-usta-vs-hisa-10-25-2020> [last viewed January 19, 2021].
- ³² See Kieran O’ Sullivan, *supra* note 9.
- ³³ HISA § 1203(a).
- ³⁴ See Matt Hegarty, “Seven Named to Committee to Select Board for Horseracing Integrity and Safety Authority,” *Daily Racing Form*, (Oct. 6, 2020); Press Release, “Blue-Ribbon Nominating Committee Formed to Select Horseracing Integrity and Safety Authority Board Members,” *Paulick Report*, (Oct. 6, 2020). The co-chairs of the nominating committee are Leonard Coleman, the former president of baseball’s National League and Dr. Nancy Cox, dean of the College of Agriculture at the University of Kentucky. Nothing in the press release indicates who selected the nominating committee and what enabled these groups or individuals to select the nominating committee. Per the website of the Coalition of Horse Racing Safety, the “incorporator” named the nominating committee. See <http://www.horseracingintegrity.com/>.
- ³⁵ HISA §1205(e)(1)(A).
- ³⁶ HISA §1204.
- ³⁷ *Id.*
- ³⁸ HISA §1205(c)(2).
- ³⁹ HISA §1209.
- ⁴⁰ HISA §1205(l).
- ⁴¹ The same would be true of an election by the American Quarter Horse Association. It would place all of quarter horse racing under Authority control.
- ⁴² HISA §1206(e)(1). See generally House Report *supra* note 15, at 26.
- ⁴³ HISA §1206(f)(2).
- ⁴⁴ HISA §1206(f)(1).
- ⁴⁵ HISA §1206(e)(3).
- ⁴⁶ See *supra*, note 34.
- ⁴⁷ House Report, *supra* note 15, at 24.
- ⁴⁸ *Id.* at 25.
- ⁴⁹ HISA §1207(b).
- ⁵⁰ HISA §1205(e).

⁵¹ HISA §1206(g).

⁵² *Id.*

⁵³ HISA §1204.

⁵⁴ HISA §1208.

⁵⁵ HISA §1209.

⁵⁶ HISA § 1211.

⁵⁷ *See generally* Emily S. Bremer, “Bureaucracy Unbound: Can Limited Government and the Administrative State Co-Exist?: Article: Incorporation By Reference In An Open-Government Age,” 36 HARV. J.L. & PUB. POL’Y 131 (2013); Jonathan R. Siegel, “The Use of Legislative History in a System of Separated Powers,” 53 VAND. L. REV. 1457 (2000).

⁵⁸ *Murphy v. N.C.A.A.*, 138 S. Ct. 1461 (2018). *See also* *New York v. United States*, 505 U.S. 144 (1992). It may be that if a court found a violation of the 10th Amendment, that it would strike out the offending provision, without invalidating the full statute.

⁵⁹ HISA §1205(1)(2). It is questionable whether a racing commission, acting without the legislature, can mandate a funding mechanism.

⁶⁰ HISA §1211(a)(2).

⁶¹ *See* *Fink v. Cole*, 302 N.Y. 216 (1951) finding that the delegation to the private Jockey Club that gave the Club significant authority in the licensing decision of the State Racing Commission was an abdication of legislative power. *See also* Conor R. Crawford, “Nutraceuticals in American Horseracing: Removing the Substantive Blinkers from National Racing Legislation,” 23 ANIMAL L. 163 (2016). On the general issue of delegation of functions to private entities, see James M. Rice, “Note: The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations,” 105 *Calif. L. Rev.* 539, (2017); Gillian E. Metzger, “Privatization as Delegation,” 103 *Colum. L. Rev.* 1367, (2003).

⁶² HISA §1203(f).

⁶³ HRU Feedback (2020-10-10) – “Letters to the Editor,” *Harness Racing Update*, available at <https://harnessracingupdate.com/2020/10/10/hru-feedback-2020-10-10-letters-to-the-editor/> [last viewed January 19, 2021].

⁶⁴ Interstate Horseracing Act of 1978, *supra* note 25.

⁶⁵ Despite the HISA move to national uniformity, racing commissions will continue to have their own separate rules of the race.

⁶⁶ The star rider Eddie Arcaro was suspended for a year in 1942 by racing officials in New York for trying to injure rider Vince Nodarse in a race. The stewards asked Arcaro “if he had deliberately tried to drop Nodarse over the rail. No, Arcaro said, ‘I was trying to kill the SOB.’” Steve Jacobson, “He Rode to Win,” *Newsday*, November 16, 1997. *See also* Frank Graham, “Setting the Pace,” *Asbury Park Evening Press*, (Aug. 10, 1943).

⁶⁷ Horse racing has no therapeutic drug exemption. USADA in 2019 granted 477 therapeutic use exemptions out of 884 applications. Only 45 were formally denied. U.S. Anti-Doping Agency, 2019 Annual Report, 29, available at <https://www.usada.org/wp-content/uploads/2019-USADA-Annual-Report.pdf> [last viewed January 22, 2021]

⁶⁸ Todd Dewey, “Report: Floyd Mayweather Received Banned IV’s Before Pacquiao Fight,” *Las Vegas Review-Journal*, September 9, 2015.

⁶⁹ *See Legislation to Promote the Health and Safety of Racehorses focusing on H.R.1754, the “Horseracing Integrity Act of 2019” Before the House Energy and Commerce Subcommittee on Consumer Protection and Commerce* (testimony by Edward Martin, President and CEO, Association of Racing Commissioners International, Inc.).

⁷⁰ *Id.*

⁷¹ *See* USADA 2019 Annual Report, *supra* note 67.

⁷² Matt Hegarty *supra* note 27.

⁷³ *Id.*

⁷⁴ 2020 Jockey Club Fact Book, available at <http://www.jockeyclub.com/default.asp?section=Resources&area=11> [last viewed January 22, 2021]. This is based on an average of approximately 7.5 starters in the 36,207 races.

⁷⁵ The United States Trotting Association reports that in 2019 there were 35,714 pari-mutuel races with 283,080 total starts. E-mail from Dan Leary, Director of Marketing and Communications, United States Trotting Association to author (January 25, 2021) (on file with author).

⁷⁶ 2019 USADA Annual Report, *supra* note 66, at 55. In fact, despite its intelligence-based testing, USADA, in 2019 found a total of 120 potential drugging violations of which only 29 resulted in a sanction.

⁷⁷ Manhattan U.S. Attorney Charges 27 Defendants, *supra* note 16.

⁷⁸ Federal Trade Commission Annual Performance Report for Fiscal Year 2020, *available at* <https://www.ftc.gov/system/files/documents/reports/annual-performance-report-fiscal-year-2020/p859900fy2020performanceplan.pdf>. [last viewed January 20, 2021].

⁷⁹ “Judges’ Lawsuit: Disability System ‘in Crisis,’” CHICAGO DAILY HERALD, (April 20, 2013).

⁸⁰ SSA_Final_FY_2020_Annual_Performance_Report_01_19_2021_Signed.pdf 13 SSA Annual Performance Report Fiscal Year 2020 41 (2021) [last viewed January 20, 2021].

⁸¹ United States District Courts — National Judicial Caseload Profile fcms_na_distprofile0331.2020.pdf (uscourts.gov) [last viewed January 20, 2021].

⁸² Racing’s ideas on what constitutes a safe track surface have constantly changed. In 1963, the Meadows, a harness track in western Pennsylvania installed 3-M’s “Tartan” track. Several years later, Calder and Tropical in South Florida added a “Tartan” track. The “Tartan” track was supposedly safer because of its consistency and absence of holes. It did not prove to be successful. Aqueduct in the 1970’s constructed an inner dirt track which had added salt, which would be safer in the winter because it would prevent the track from freezing. Remington Park in the 1980’s built an all-weather Equi-Track which was designed to be safer and more consistent. Synthetic tracks in the 21st century came into style, then were frequently replaced and may be coming back into style. See Stan Bergstein, “Synthetic Experiments Meet Similar Fates,” Daily Racing Form, October 19, 2010; Red Smith, “Synthetic Track Proves a Success,” Buffalo Courier-Express, June 30, 1963. Safety in racing is much like the 1957 musical, “The Music Man.” Not only is there a potential for charlatans like Harold Hill to pose as safety experts, but the end objective of safety, much like the song “Shipooopi,” is a goal that’s hard to get.

⁸³ HISA, §1202(4)(A).

⁸⁴ See Edward Martin testimony, *supra* note 69. “It is not unreasonable to ask why drugs need to be given to horses that have never raced and have not been injured. This gap in the regulatory structure must be closed, either governmentally or by an NGO.”

⁸⁵ HISA §1208(d).

⁸⁶ HISA §1202(6).

⁸⁷ Time for a Change won 5 of 9 races lifetime and defeated the previously unbeaten Devil’s Bag in the 1984 Flamingo. This was the only defeat in Devil Bag’s career.

⁸⁸ Hall of Famer Damascus was the Horse of the Year in 1967.

⁸⁹ Hall of Famer Top Flight won 7 of 7 races in 1931.

⁹⁰ Hall of Famer Assault won the Triple Crown in 1946.

⁹¹ Hall of Famer Cigar won 16 consecutive races from 1994-1996.

⁹² Hall of Famer Regret was the first filly to win the Kentucky Derby in 1915.

⁹³ Sham finished second to Secretariat in the 1973 Kentucky Derby and Preakness.

⁹⁴ Devil His Due won 11 races including the Pimlico Special, the Gulfstream Park Handicap and the Suburban Handicap in 1993.

⁹⁵ Hall of Famer Forego was horse of the year for three consecutive years from 1974-1976.

⁹⁶ Hall of Famer John Henry was the horse of the year in 1981 and 1984.

⁹⁷ Hall of Famer Crusader won 9 races in 1926 including the Belmont Stakes.

⁹⁸ Hall of Famer Buckpasser won 13 races and was the horse of the year in 1966.

⁹⁹ Hall of Famer Affirmed won the Triple Crown in 1978.

¹⁰⁰ Hall of Famer Open Mind won 12 of 19 races lifetime.

¹⁰¹ Upset in the 1919 Sanford was the only horse ever to defeat Man o’ War.

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