Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter of	)	Docket No. FTC–2022-0014
	)	
HISA Assessment Methodology	)	File No. P222100
	)	
	)	

COMMENT OF:

THOROUGHBRED HORSEMEN'S ASSOCIATIONS, INC.

THOROUGHBRED OWNERS OF CALIFORNIA

KENTUCKY THOROUGHBRED ASSOCIATION

THOROUGHBRED OWNERS AND BREEDERS ASSOCIATION

MID-ATLANTIC STRATEGIC PLAN TO REDUCE EQUINE FATALITIES

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The proposed Assessment Methodology Rule is contrary to the governing statute, the Horseracing Integrity and Safety Act (the "Act"), and should not be adopted. The undersigned Commenters have been and remain highly supportive of the Horseracing Integrity and Safety Authority ("HISA" or the "Authority") and agree that the Authority needs an effective assessment plan. Unfortunately, the Authority's proposed assessment methodology is flawed and threatens to undercut the Authority's sustainability at the outset, even if adopted only for a year. We are concerned that the proposal, if adopted, will bog the Authority down in litigation, potentially cause unnecessary discord amongst racing's stakeholders and covered persons, and undermine the Authority's ability to effectively fulfill its statutory mission. Put simply, the Authority's proposed methodologies for assessments on both the interstate and intrastate level are inconsistent with the Act, fundamentally flawed, and lack the necessary evidentiary support for adoption.

For the Authority's ***interstate*** proposal, the Authority's methodology is contrary to the plain language of the Act, which explicitly requires state-by-state assessments to be proportionally allocated by the number of racing starts in each State. The proposed methodology instead uses a complicated formula that weights the allocation by purse size and in fact *decreases* the allocation for States with more races – the opposite of what the Act requires. The Authority attempts to justify this by arguing for an "equitable" allocation among States – which is *not* the correct standard for interstate calculations under the Act – but even that is undermined by a convoluted methodology that arbitrarily allocates assessments even between States with smaller purses, and lacks any basis in the estimated costs for maintaining horseracing safety and integrity on a state-by-state basis.

The Authority's ***intrastate*** proposal is also flawed. In cases where State racing commissions opt out of collecting assessments directly, which appears to be likely, the Authority seeks to shift the responsibility for equitably assessing and collecting the Authority's fees as to covered persons, from themselves or the racing commissions, to the racetracks. This creates a massive conflict of interest and sows the seeds for potential local discord and business interruption, an outcome that would unnecessarily undermine the Authority and its purpose.

Accordingly, the Federal Trade Commission ("FTC" or "Commission") should reject the proposed interstate assessment methodology and require an assessment calculation in the accordance with the Act.

I. BACKGROUND

The Thoroughbred Horsemen's Associations, Inc., Thoroughbred Owners of California, Kentucky Thoroughbred Association, Thoroughbred Owners and Breeders Association, and Mid-Atlantic Strategic Plan to Reduce Equine Fatalities (collectively, "Commenters") comprise many of the leading associations of licensed Thoroughbred horse owners and trainers in the United States, as well as the industry stakeholders and regulators from the Mid-Atlantic region. We have been intimately involved in developing rules and standards for equine health, safety and

welfare and the integrity of racing in the heavily state-regulated horse racing industry for many years. Further information about the Commenters can be found in our comment on the Authority's proposed Racetrack Safety Rules, Docket No. FTC–2021–0076, on January 19, 2022 and proposed Enforcement Rules, Docket No. FTC–2022-0009, on February 9, 2022.

The Commenters are highly supportive of the Authority and would greatly like to see it succeed. We view a well-developed economic model to be foundational to the Authority's long-term success. We understand that the Authority will need to make judgments and tradeoffs in the longer term that will fall differently on different stakeholders, and we encourage the Authority to use as simple a model as possible to avoid negative externalities and unintended consequences. We submit this comment with the goal of helping to establish an Authority with ready access to the funds that it needs, collected in a fair and uncontroversial way from the outset.

This comment addresses the proposed HISA Assessment Methodology Rule, Docket No. FTC–2022–0014. As a procedural matter, as HISA acknowledges,[1] the Authority emailed certain stakeholders its proposed assessment rule on December 23, two days before Christmas. Commenters do not have clear visibility on when HISA submitted it to the FTC. Since mid-January, representatives of Commenters and their members have been engaged in extensive discussions with the Authority pointing out the deficiency in its methodology. HISA's representatives have been unwilling to make any adjustments from their original position, even after the proposal's methodological flaws have been pointed out.

II. STANDARD OF REVIEW

As the Commission has noted, "[t]he Act gives the Commission two criteria against which to measure proposed rules and rule modifications: 'The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—(A) this chapter; and (B) applicable rules approved by the Commission.'" *HISA Assessment Methodology Rule*, 87 Fed. Reg. 9349, 9351 (Feb. 18, 2022) (citing 15 U.S.C. § 3053(c)(2)). "In other words, the Commission will evaluate the proposed rule for its consistency with the specific requirements, factors, standards, or considerations in the text of the Act as well as the Commission's procedural rule." *Id*.

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

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[1] *HISA Assessment Methodology Rule*, 87 Fed. Reg. 9349, 9350 (Feb. 18, 2022).

The Commission could take one of two steps to address issues with the Authority's proposed rule. First, it could disapprove the specific rule and adopt the Commenters' recommendation for modification, and allow the Authority to resubmit the rule. 15 U.S.C. § 3053(c)(3)(A). In the alternative, the Commission could adopt an interim rule, pursuant to 15 U.S.C. § 3053(e), that implements the Commenters' recommended alternative for the forthcoming assessment period, in order to protect the health and safety of covered horses. *Id*.

In light of the short timeline for initiating the assessment process under the Act, an interim final rule establishing a straightforward funding formula consistent with the Act is likely the best option under these circumstances. Our understanding is that the Authority intends to seek more input and will have more time for consideration in subsequent funding cycles. Accordingly, Commenters recognize that their proposal may only be implemented for a year, and that there may be alternative funding mechanisms that are consistent with the Act that could be adopted in the future. However, given statutory deadlines for the Authority to begin operations, we believe it would make sense to establish a default allocation methodology grounded directly in the text of the Act for at least an interim period, and set a deadline for the Authority to circulate a proposal for subsequent years, well in advance of statutory deadlines for submission to the Commission for approval. We outline this proposal further in Part V.

III. THE PROPOSED INTERSTATE ASSESSMENT METHODOLOGY MUST BE REJECTED.

With respect, the FTC should reject the proposed interstate assessment methodology in the Rule, as proposed in Rule 8520(c), as contrary to the Act. The relevant portions of the methodology in the proposed Assessment Rule are included in Appendix A.

There are three separate deficiencies with the Authority's proposal, any of which would justify rejecting the Rule. *First*, by basing interstate allocation of contributions to a significant extent on purse value, the proposed Rule conflicts with the plain language of the Act, which requires interstate allocation of contributions proportionally by number of racing starts. *Second*, even on its own terms of trying to reach "equitable" outcomes, the Rule's methodology is in fact *inequitable*, and treats similar states differently based on arbitrary factors that the Authority has apparently not considered. *Third*, the Rule simply cannot be justified on any basis without knowing the relative costs and anticipated funding allocations in each state, and HISA has not provided any supporting evidence on anticipated costs or other sources of revenue.

A. The Proposed Rule Contradicts the Statutory Text by Basing Each State's Funding Contribution on the Purse Value in the State, Rather Than Proportionately on the Number of Racing Starts.

The Act requires the Authority to annually calculate an amount required from each State to fund the State's "proportionate share" of the horseracing anti-doping and medication control program and the racetrack safety program. 15 U.S.C. 3052(f)(1)(C)(i). The Act further mandates that the Authority base this calculation, in relevant part, on "the projected amount of

covered racing starts for the year in each State." 15 U.S.C. 3052(f)(1)(C)(ii). The Authority's proposed rule departs from the calculation specified by the Act by basing its funding calculation in part on "Projected Purse Starts." *See* 87 Fed. Reg. at 9350-52 (defining "Annual Covered Racing Starts" as the sum of "50 percent of Projected Starts and 50 percent of Projected Purse Starts"). A "Projected Purse Start" is a measure of purse value – made up out of whole cloth by the Authority – *not* the number of starts, and it also *increases* a State's proportionate share of the funding based on the dollar amount of the purses in the States and *decreases* its proportionate share based on having more starts. Because the Authority's proposed methodology directly conflicts with the statutory text, the Commission must reject it.

In particular, for interstate allocation of assessments, the proposed Rule uses a novel and ill-conceived calculation involving the size of the purses rather than merely the number of starts. Proposed Section 8520(c) states:

> Upon the approval of the budget for the following calendar year by the Board of the Authority, and after taking into account other sources of Authority revenue, the Authority shall allocate the calculation due from each State pursuant to 15 USC 3052(f)(1)(C)(i) proportionally by each State's respective percentage of the Annual Covered Racing Starts.

However, the Authority defines an "Annual Covered Racing Start" not as an actual horseracing start, but rather as a *calculation* which includes measurements of purse value. Specifically, in proposed Section 8510(a), "Annual Covered Racing Start" is defined as "for the following calendar year, the sum of: (i) fifty percent (50%) of the number of Projected Starts; plus (ii) fifty percent (50%) of the number of Projected Purse Starts." The term "Projected Purse Starts" in Section 8510(d) is altogether novel – "(i) the total amount of purses for Covered Horseraces as reported by Equibase (not including the Breeders' Cup World Championships Races), after taking into consideration alterations in purses for the relevant State(s) for the following calendar year; divided by (ii) the Projected Starts for the following calendar year." Indeed, "Projected Purse Start" is a misnomer, because it is *not* a measurement of the number of starts but rather is a measure of *purse value* (on a per-start basis).

As a result, the "Annual Covered Racing Start" calculation is confusing on its own terms, as it purports to add together two different kinds of measurements – actual starts and adjusted purse amounts. To add to the complexity, Section 8510(c) outlines a complicated calculation of how "Annual Covered Racing Starts" are applied in the allocation. The calculation does not even appear to track the actual definition of a "Annual Covered Racing Start," and it is even more removed from a per-start calculation, if not completely contrary to it. Under Section 8520(c)(1) and (3), *half* of the per-state allocation is accomplished by looking at the number of starts by state. The other half involves taking 50% of the start-based allocation number, and multiplying that by a complicated fraction that divides the State's overall share of purse value

with the State's overall share of racing starts. Proposed Section 8520(c)(2).[2] Even more confusingly, the supporting document submitted by the Authority as Exhibit 1 does not even appear to accurately apply the "Annual Covered Racing Start" methodology, though it continues to weight higher pursue sizes in its calculations.[3]

This is completely inconsistent with the plain language of the Act. Under the Act, the Authority must base its annual fee calculation, to fund the State's "proportionate share" of its programs, on "the projected amount of covered racing starts for the year in each State[.]" 15 U.S.C § 3052(f)(1)(C)(ii). While the term "covered racing starts" is not defined in the statute, the term "covered horserace" is defined as "any horserace involving covered horses that has a substantial relation to interstate commerce[.]" 15 U.S.C § 3051(5). Thus, by its plain language, a "covered" racing start is simply a racing start in a covered horserace.[4]

This statutory language makes clear that the "amount of covered racing starts" refers solely to the number of racing starts in the state, not any consideration of the purse value. Indeed, the proposed Rule itself acknowledges that "racing start" has a straightforward meaning. It defines "Projected Starts" as the "the number of starts in covered horseraces in the previous twelve [(12)] months….." Proposed Section 8520(e)(1)(ii). And it sets up its complicated calculation only defining a new term "Projected Purse Starts" that does not appear in the statute and as noted above, is not even a measurement of starts.

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[2] This requires a calculation of "50 percent of the quotient calculated in (c)(1) is multiplied by the quotient of (i) the relevant State's percentage of the total amount of purses for all Covered Horseraces as reported by Equibase (not including the Breeders' Cup World Championships Races), after taking into consideration alterations in purses for the relevant State for the following calendar year; divided by (ii) the relevant State's percentage of the Projected Starts of all Covered Horseraces starts." Proposed Section 8520(c)(2).

[3] The formula applied in Exhibit 1 does not appear to yield the same results as the "Annual Covered Racing Start" calculation described in the proposed regulation. In the exhibit, the Authority creates two sets of "per start fees" and combines them together. This is not the process described for calculating the fees using "Annual Covered Racing Starts." While they sound similar, the calculations results in significant differences. For example, using calculation based on our understanding of the "Annual Covered Racing Start" approach:

State	Per Start Fee in Regulation	Per Start Fee in HISA Exhibit 1
AZ	$3.10	$2.40
CA	$3.41	$4.63
DE	$5.19	$3.48
KY	$4.00	$5.01
NY	$3.77	$5.48

[4] Moreover, the legislative proposals introduced in the run-up to the passage of the Act, and supported by many stakeholders, all were similarly clear that fees were to be collected on a per-start basis. *See* H.R. 2651 (2017) (providing that for direct collection of fees by the Authority, "the Authority shall calculate each month the applicable fee per racing start multiplied by the number of racing starts in the State in the previous month"); H.R. 1754 (2019) (same); S. 1820 (2019) (same). There was no proposal to allocate fees by purse size. The Authority is attempting to re-write the statute.

In the Notice of Proposed Rulemaking, the Authority effectively admits that its proposed rule departs from the text of the statute. Even though the Authority acknowledges that the "Act states that the basis of the funding calculation is a State's proportionate share of 'the projected amount of covered racing starts for the year in each State,'" the Authority departs from that calculation because the "Authority was not in favor of simply treating all racing starts in a given State uniformly as a 'covered racing start' because this would result in an inequitable allocation of costs." 87 Fed Reg. at 9350 (quoting 15 U.S.C. 3052(f)(1)(C)(ii)).

However, neither the Authority nor the Commission are permitted to deviate from the requirements of the statute simply because the Authority thinks that the statutory scheme chosen by Congress is "inequitable." *See, e.g.*, *Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, 424 F. Supp. 2d 37, 49, 52 (D.D.C. 2006) (holding that agency action "was arbitrary, capricious, and otherwise not in accordance with the law, in violation of the APA" where "the Agency's application runs counter to the relevant statutes' plain language"); *Otay Mesa Prop., L.P. v. United States Dep't of the Interior*, 344 F. Supp. 3d 355, 377 (D.D.C. 2018) (an agency "violate[s] the APA in issuing an interpretive rule that [is] 'contrary to the plain language of the statute'") (quoting *Pharm. Research & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, 138 F.Supp.3d 31, 54 (D.D.C. 2015)). The Act requires the Commission to review all rules proposed by the Authority for "consistency with the specific requirements, factors, standards, or considerations in the text of the Act . . . ." 87 Fed. Reg. at 9351 (citing 15 U.S.C. 3053(c)(2)).

The Authority's reliance on "equitable" allocation is particular misguided, because that is squarely *not* the standard for calculating interstate allocations. On the contrary, Congress included a provision allowing the Authority some discretion for "equitable" distribution only in the provisions dealing with *intra*state allocation, which apply when States opt out of collecting fees and the Authority must do so directly. *See* 15 U.S.C. 3052(f)(3)(A), (B) (specifying that the Authority shall calculate the fees attributable to any state that elects not to remit fees and then to "allocate equitably the amount calculated under subparagraph (A) collected among covered persons involved with covered horseraces"). This strongly indicates that Congress did not intend for the overall distribution between states to be determined by the Authority's own view of what is "equitable," and the Authority is without power to alter the distribution selected by Congress. *See Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993) ("Congress included a prejudice requirement whenever it considered it appropriate to do so, and . . . [its] omission of any such requirement in [a specific section] was deliberate.").

In short, under the Act, the Authority must annually calculate the amount to be assessed to each State "to fund the State's proportionate share of the horseracing anti-doping and medication control program and the racetrack safety program for the next calendar year; and to liquidate the State's proportionate share of any loan or funding shortfall in the current calendar year and any previous calendar year." 15 U.S.C § 3052(f)(1)(C)(i). According to the Act, that calculation must be based on only three factors: (1) the budget; (2) "the projected amount of covered racing starts for the year in each State[,]" and (3) an adjustment for any other source of

Authority revenue. 15 U.S.C § 3052(f)(1)(C). The Rule fails to rely on the number of starts, and to calculate the assessment proportionately on that basis. In Part V, we discuss how this can be fixed, consistent with the Act.

B. The Proposed Calculation Is Arbitrary In Attempting to Reach An Equitable Outcome.

While the Proposed Rule must be rejected purely on the basis of contradicting the Act, it also fails based on the Authority's own rationale of "equitable" allocation of costs. In particular, the definition of "Projected Purse Starts" and related calculation not only mean that States with higher overall purse amounts pay more, but that states with higher frequency of racing starts – regardless of overall purse amount – pay less. In short, the Authority's overly complicated calculation rewards *high-frequency* States, which has nothing to do with an "equitable" assessment of costs.

As noted above, the Authority's rationale is clearly aimed at adopting an approach that draws more fees from States with higher purses and entry fees, as the basis for an "equitable" allocation. The Authority gives the example that "if all starts in all races at all tracks were treated equally, West Virginia would have a larger proportionate share than Kentucky, even though the purses and entry fees generated by the Kentucky races dwarf those generated by West Virginia races." 87 Fed Reg. at 9350. It therefore "defined Annual Covered Racing Starts in a manner that is consistent with an equitable allocation of the funding needs of the Authority." *Id*.

However, regardless of whether the Authority's formula draws more fees from larger purses, it also shifts fees away from States that merely have more total starts. The following chart illustrates how the formula would treat States with similar purse sizes differently, and reward those with more starts by charging them proportionately less. The following chart uses a sample $50 million budget for HISA:

State	2021 Starts	% Total Starts	2021 Purses	Per Start Fee	% of HISA Budget	$50M Budget Overpayment (Underpayment)
Arkansas	5,011	2.06%	$40,696,500	$5.67	2.84%	$376,530
West Virginia	17,480	7.19%	$45,053,200	$3.20	5.60%	($848,622)
Ohio	16,790	6.91%	$45,450,500	$3.26	5.48%	($766,582)
New Jersey	4,436	1.82%	$26,981,963	$4.76	2.11%	$131,534
Texas	6,706	2.76%	$26,489,975	$3.81	2.56%	($120,179)

In this example, West Virginia and Ohio have higher purses than Arkansas, but Arkansas actually pays disproportionately more on a per-start basis as compared to a per-start approach, because it has many fewer starts than West Virginia and Ohio. While Arkansas still pays less than West Virginia and Ohio in the aggregate, it pays more than it would under a per-start approach while West Virginia and Ohio – with larger purses – benefit from the formula. New Jersey and Texas provide another clear example: the States have nearly the same purse sizes but New Jersey pays disproportionately more because it has fewer racing starts. By the terms of the Authority's own justification for its formula, it does not treat similar states "equitably" or similarly at all – it treats states with similar overall purses differently and arbitrarily (at best).

The Authority does not even try to justify lowering fees for high-frequency States – which again as noted in Part III.A is the *opposite* of what the Act requires – but even if it did, there is no justification for doing so. Much of the costs are likely to be based on medication testing for horses. *See, e.g.*, 15 U.S.C. § 3055(c)(4)(C). Indeed, Commenters expect this will be a significant part of the Authority's budget. The testing costs generally will scale with the number of racing starts, because each horse will need to be tested – and they will have little or nothing to do with purse value.

Moreover, linking a State's fee to its purse structure would create at least two significant negative ripple effects. First, it would encourage a State to run more races for lower purses. Second, it would also encourage States to distribute money outside of the purse structure (e.g, per-start fees or workers compensation subsidies). Both of these strategies, which would surely be adopted, have proven dangerous to our most vulnerable horses, and are in direct conflict with the purpose of the Authority, which is to ensure a safer racing environment.

None of these factors have been addressed by the Authority in its submission, and indeed, when Commenters have raised them, we have not received satisfactory answers to address what appears to be unintended effects of the Authority's novel formula. A proposed rule must be rejected if it is not supported or is inconsistent with the cited evidence. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency."); 16 C.F.R. § 1.142(e). The proposed Rule must be rejected on this ground as well.

C. The Proposed Calculation Cannot Be Justified Without Knowing the Allocation of Expenses and Overall Budget.

The Rule must also be rejected because the Authority cannot justify its allocation of funds – under any standard – without establishing how the funds will be distributed. The Authority could essentially try to directly subsidize participants in certain States through its budget, but it is not possible to evaluate that under any standard, including an "equitable" standard. Indeed, as noted above, the proposed fees do not appear to be aligned with the

apparent need for per-start testing – but the Authority has not even confirmed how the budget for testing will work.

As noted above, the Act requires a "basis of calculation" for the interstate assessment, 15 U.S.C. § 3052 (f)(1)(C)(ii), which includes consideration not only the number of covered racing starts, but also a budget and other sources of Authority revenue. However, this basic information is lacking. Among the many questions necessary to determine whether the allocation is equitable, the Commission would need to know:

1. Will each State be responsible for the specific costs incurred within its borders or will it possibly have to subsidize other states for attributable costs?
2. Is HISA's proposed calculation applicable to all costs nationwide or only for those costs not attributable to a State in particular?
3. Will regional cost differences (e.g. labor) be taken into consideration in the proportionate assignment of a State's costs?
4. What is the projected annual budget for the Authority, both in its initial year of operation and in subsequent years of full operation?
5. What other sources of revenue is the Authority contemplating, and how much is the Authority budgeting for these other sources of revenue?

In short, the Authority has failed to provide sufficient evidence to justify its proposed Assessment formula, because it has failed to provide information, which is within its ability to provide, that is necessary to evaluate the formula's sufficiency under the Act. It must be rejected on that basis. *See* 87 Fed. Reg. at 9351; 16 C.F.R. § 1.142(e); *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

IV. THE PROPOSED INTRASTATE ASSESSMENT METHODOLOGY MUST BE REJECTED.

The Authority's proposed mechanism for the **intrastate** assessment and collection of fees billed by the Authority, as set forth in proposed Rule 8520(e), is problematic for several reasons, including that it creates an untenable conflict of interest and threatens discord and potential negative consequences for a local and state racing industry that could lead to the interruption of racing under the Interstate Horseracing Act of 1978, 15 U.S.C. Ch. 57. It also should be rejected as inconsistent with the Act and unsupported by evidence. The relevant portions of the intrastate mechanism in the proposed Assessment Rule are included in Appendix A.

There are two flaws with the intrastate assessment mechanism: (1) it empowers one covered stakeholder (racetracks) to set and collect fees from other stakeholders, in a departure from existing practice and the Act's text, and (2) it relies entirely on purse-driven allocation formula, which also ignores the Act's text to consider racing starts as part of the allocation.

First, the proposed Rule is flawed in giving racetracks authority to set and collect fees from other stakeholders if State racing commissions opt out of fee collection. As background, under the Act, the Authority must send a State's annual assessment to the State's racing

commission. 15 U.S.C. § 3052(f)(1)(C). If the racing commission elects to pay its assessed fees, it is required to determine the method by which such fees are equitably allocated among ***all*** of its covered persons, and it is required to collect such fees. 15 U.S.C. § 3052(f)(2)(D). Since each racing commission has jurisdiction over all such covered persons under State law, it is well positioned not only to make the equitable calculation, but also to collect such fees.

Regrettably, the Authority departs from this fundamental practice in the instance where the State racing commission elects not to collect and pay such fees, and the Authority must stand in the shoes of the racing commission. Notwithstanding that the Act authorizes the Authority to stand in those shoes and allocate equitably the assessment among all covered persons, in its proposed Rule the Authority shifts this responsibility to the racetracks, which are themselves covered persons. In essence, the Authority empowers one covered person, with a material financial interest in its share of the Authority's fees and costs, to solely determine the fees of all other covered persons, and have them collect such fees, notwithstanding it may not have the power or jurisdiction to do so.

This is a blatant conflict of interest that is without any rational basis. We can only presume that the Authority is of the notion that the determination of such costs will be the subject of contractual negotiations, but such thinking is entirely misplaced. The proposed rule sets the stage for discord amongst covered persons in a State, and could lead disaffected horsemen, for example, to invoke their protected rights under the Interstate Horseracing Act, and cause a cessation of racing and/or simulcasting. See 15 U.S.C. § 3004 (requiring consent from multiple parties including horsemen's groups to authorize interstate off-track wagers). For New York's horsemen, there is no bargaining power or right to protect themselves in such negotiations because they are exempted from the Interstate Act. In States with multiple track ownership, there could be a lack of consistency. In States whose tracks are owned by casino companies, the track has little incentive to fairly determine assessments. Frankly, not only do we believe that the proposed rule is untenable, but we think many racetracks agree.

Finally, under the proposed regulation, the ultimate decision on the equity of the assessment method by a racetrack is reviewable by the Authority within a 30-day window, but this adds another layer of potential disagreement and strife, which is totally unnecessary.

This entire structure is squarely inconsistent with the Act, which provides that the Authority "shall allocate equitably the amount calculated under subparagraph (A) collected among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate," 15 U.S.C. § 3052(f)(3)(B), and shall "assess a fee equal to the allocation made under subparagraph (B) and shall collect such fee according to such rules as the Authority may promulgate." *Id*. § 3052(f)(3)(C). And while the Authority is permitted to make rules in this area, which may include requiring a negotiation between covered persons in order to attempt to reach a negotiated solution, the Act is clear that the Authority – not one of the covered persons under the Act – must perform the allocation, assessment, and collection. Additionally, the Authority has failed to submit evidence to justify this stark reversal of current

practice, and it also must fail on that basis. *See* 87 Fed. Reg. at 9351; 16 C.F.R. § 1.142(e); *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

Second, the intrastate assessment structure is inconsistent with the Act because it jettisons a per-start allocation and instead requires allocation to be based on a purse structure. Under the Authority's proposed rule, if State racing commissions choose not to remit fees, then allocation amounts are proportionally divided up by racetracks within the State explicitly by purse size. In particular, proposed Rule 8520(e)(3) provides that the "Authority shall allocate the monthly Assessment Calculation proportionally based on each Racetrack's proportionate share *in the total purses* in Covered Horseraces in the State over the next month and shall notify each Racetrack in the jurisdiction of the amount required from the Racetrack." (emphasis added). This is a complete departure from the Act, which provides, in the case of State opt-out, that "the Authority shall, not less frequently than monthly, calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month," and "allocate equitably the amount calculated under subparagraph (A) collected among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate." 15 U.S.C. 3052(f)(3)(A)-(B). While this intrastate allocation provision arguably does give the Authority discretion in allocation, it does not contemplate ignoring per-start allocation altogether. Additionally, as discussed above, it is simply unfair considering the majority of the cost is in the medication testing and that cost is the same regardless of the purse level. *Supra* at p. 8. The Authority provides no evidentiary basis for discarding per-start allocation altogether. *See* 87 Fed. Reg. at 9351; 16 C.F.R. § 1.142(e); *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43.

In conclusion, we recommend that the Authority not be permitted to abdicate the method of assessing costs amongst covered persons to the racetracks and request that the rule be amended to either require the State racing commission or the Authority to make such an equitable determination in the event that a Racing Commission elects not to collect the Authority's fees.

V. THE COMMISSION SHOULD ADOPT INTERIM ALTERNATIVES CONSISTENT WITH THE ACT WHILE THE AUTHORITY DEVELOPS PROPOSALS FOR FUTURE YEARS.

Under the Act, the Authority is required to provide interstate allocation amounts by April 1 of this year. *See* 15 U.S.C. § 3052(f)(1)(C). Given the short amount of time for interstate allocations to be issued, Commenters believe that the easiest and most logical solution is to utilize a strict per-start allocation for interstate assessments for the remainder of the year. This accords with the Act and is straightforward to calculate and administer.

We also recommend that the Commission require the Authority to submit a comprehensive budget proposal, including interstate assessment calculations, for public comment by August 1, 2022, and to provide a month for public comment prior to submission for

FTC approval. Under the Act, the Authority is required to provide interstate assessment calculations by November 1 going forward, and an August 1 deadline should give sufficient time for meaningful development of a budget proposal and meaningful input from stakeholders. *Id*. We understand that the Authority's budgetary needs will change in the next few years, particularly as medication control programs are ramped up, and we understand that the Authority may have alternative approaches to addressing and allocating these costs in the budget. We look forward to engaging on proposals and helping the Authority succeed. Thus, we recommend that the Commission adopt a straightforward interim rule (outlined in Appendix A), while requiring more developed proposals from the Authority.

On intrastate portion, we recommend that, if State racing commissions opt out of fee assessment and collection, the assessment calculation should default to a strict per-start basis, rather than the Authority trying to impose a per-purse equitable determination. Additionally, the equitable distribution among covered persons should be subject to negotiation prior to Authority approval. Given that horsemen's groups are, by statute, required parties in negotiations regarding interstate off-track wagering, *see* 15 U.S.C. § 3004, they should be required parties in any fee allocation negotiation, even if (as the Act states), the Authority retains ultimate discretion to approve the allocation.

CONCLUSION

For the reasons set forth above, we request that the FTC reject the identified portions of the proposed Rule and issue an interim proposed rule consistent with the Act, as further explained above and in Appendix A.

Respectfully submitted,

THOROUGHBRED HORSEMEN'S ASSOCIATIONS, INC.

THOROUGHBRED OWNERS OF CALIFORNIA

KENTUCKY THOROUGHBRED ASSOCIATION

THOROUGHBRED OWNERS AND BREEDERS ASSOCIATION

MID-ATLANTIC STRATEGIC PLAN TO REDUCE EQUINE FATALITIES

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APPENDIX A

Interstate allocation:

Proposed Rule 8520(c):

(c) Upon the approval of the budget for the following calendar year by the Board of the Authority, and after taking into account other sources of Authority revenue, the Authority shall allocate the calculation due from each State pursuant to 15 U.S.C. 3052(f)(1)(C)(i) proportionally by each State's respective percentage of the Annual Covered Racing Starts. The proportional calculation for each State's respective percentage of the Annual Covered Racing Starts shall be calculated as follows:

(1) The total amount due from all States pursuant to 15 U.S.C. 3052(f)(1)(C)(i) shall be divided by the Projected Starts of all Covered Horseraces; then
(2) 50 percent of the quotient calculated in (c)(1) is multiplied by the quotient of (i) the relevant State's percentage of the total amount of purses for all Covered Horseraces as reported by Equibase (not including the Breeders' Cup World Championships Races), after taking into consideration alterations in purses for the relevant State for the following calendar year; divided by (ii) the relevant State's percentage of the Projected Starts of all Covered Horseraces starts; then
(3) the sum of the product of the calculation in (c)(2) and 50 percent of the quotient calculated in (c)(1) is multiplied by the Projected Starts in the applicable State.

Provided however, that no State's allocation shall exceed 10 percent of the total amount of purses for Covered Horseraces as reported by Equibase in the State (not including the Breeders' Cup World Championships Races). All amounts in excess of the 10 percent maximum shall be allocated proportionally to all States that do not exceed the maximum, based on each State's respective percentage of the Annual Covered Racing Starts.

Replace with:

(c)(1) By April 1, 2022, upon the approval of the budget for the following calendar year by the Board of the Authority, and after taking into account other sources of Authority revenue, the Authority shall allocate the calculation due from each State pursuant to 15 U.S.C. 3052(f)(1)(C)(i) proportionally by each State's respective percentage of Projected Starts.
(2) By August 1, 2022, the Authority shall publicly circulate for comment, including by posting on a public website, any proposal for allocation of the calculation due from each State pursuant to 15 U.S.C. 3052(f)(1)(C)(i).

Intrastate allocation:

Proposed Rule 8520(e):

(e) If a State racing commission does not elect to remit fees pursuant to 15 U.S.C. 3052(f)(2):

(1) The Authority shall on a monthly basis calculate and notify each Racetrack in the State of the applicable fee per racing start for the next month based upon the following calculations:
(i) Calculate the amount due from the State as if the State had elected to remit fees pursuant to 15 U.S.C. 3052(f)(2) (the "Annual Calculation").
(ii) Calculate the number of starts in Covered Horseraces in the previous twelve months as reported by Equibase (the "Total Starts").
(iii) Calculate the number of starts in Covered Horseraces in the previous month as reported by Equibase (the "Monthly Starts").
(iv) The applicable fee per racing start shall equal the quotient of Monthly Starts, divided by Total Starts, multiplied by the Annual Calculation.

(2) The Authority shall on a monthly basis calculate and notify each Racetrack in the jurisdiction of the following calculations:
(i) Multiply the number of starts in Covered Horseraces in the previous month by the applicable fee per racing start calculated pursuant to paragraph (e)(1)(iv) above.
(ii) The calculation set forth in 15 U.S.C. 3052(f)(3)(A) shall be equal to the amount calculated pursuant to paragraph (e)(2)(i) (the "Assessment Calculation").

(3) The Authority shall allocate the monthly Assessment Calculation proportionally based on each Racetrack's proportionate share in the total purses in Covered Horseraces in the State over the next month and shall notify each Racetrack in the jurisdiction of the amount required from the Racetrack. Each Racetrack shall pay its share of the Assessment Calculation to the Authority within 30 days of the end of the monthly period.

(4) Not later than May 1, 2022 and not later than November 1 each year thereafter, each Racetrack in the State shall submit to the Authority its proposal for the allocation of the Assessment Calculation among covered persons involved with Covered Horseraces (the "Covered Persons Allocation"). On or before 30 days from the receipt of the Covered Persons Allocation from the Racetrack, the Authority shall determine whether the Covered Persons Allocation has been allocated equitably in accordance with 15 U.S.C. 3052(f)(3)(B), and, if so, the Authority shall notify the Racetrack that the Covered Persons Allocation is approved. If a Racetrack fails to submit its proposed Covered Person Allocation in accordance with the deadlines set forth in this paragraph, or if the Authority has not approved the Covered Persons Allocation in accordance with this paragraph, the Authority shall determine the Covered Persons Allocation for the Racetrack. Upon the approval of or the determination by the Authority of the

Covered Persons Allocation, the Racetrack shall collect the Covered Persons Allocation from the covered persons involved with Covered Horseraces.

Replace subsections (3) and (4) with:

(3) The Authority shall allocate the monthly Assessment Calculation proportionally based on each Racetrack's proportionate share of Projected Starts in the State over the next month and shall notify each Racetrack in the jurisdiction of the amount required from the Racetrack. Each Racetrack shall pay its share of the Assessment Calculation to the Authority within 30 days of the end of the monthly period.

(4) Not later than May 1, 2022 and not later than November 1 each year thereafter, each Racetrack in the State shall submit to the Authority its negotiated proposal for the allocation of the Assessment Calculation among covered persons involved with Covered Horseraces (the "Covered Persons Allocation"). For a period at least one month prior to the submission deadline, each Racetrack, acting separately or together, must engage in a good faith negotiation with Covered Persons that have a financial interest in the allocation of the Assessment Calculation, including horsemen's groups as defined in 15 U.S.C. § 3002. If no agreement is reached with such Covered Persons, the Racetrack must inform the Authority that it has no proposal to submit.

On or before 30 days from the receipt of a Covered Persons Allocation from the Racetrack, the Authority shall determine whether the Covered Persons Allocation has been allocated equitably in accordance with 15 U.S.C. 3052(f)(3)(B), and, if so, the Authority shall notify the Racetrack that the Covered Persons Allocation is approved. If a Racetrack fails to submit its proposed Covered Person Allocation in accordance with the deadlines set forth in this paragraph or if the Racetrack informs the Authority that it has no negotiated proposal to submit, or if the Authority has not approved the Covered Persons Allocation in accordance with this paragraph, the Authority shall determine the Covered Persons Allocation for the Racetrack. Upon the approval of or the determination by the Authority of the Covered Persons Allocation, the Racetrack shall collect the Covered Persons Allocation from the covered persons involved with Covered Horseraces.