

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Christine S. Wilson
 Alvaro M. Bedoya

**ORDER RATIFYING PREVIOUS COMMISSION ORDERS AS TO HORSERACING
INTEGRITY AND SAFETY AUTHORITY’S RULES**

January 3, 2023

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051–3060, tasks a self-regulatory nonprofit organization, the Horseracing Integrity and Safety Authority, with developing proposed rules on a variety of subjects. *See id.* § 3053(a). Those proposed rules take effect only if approved by the Federal Trade Commission, *see id.* § 3053(b)(2), which must approve the proposed rules if it finds that they are consistent with the Act and applicable rules approved by the Commission, *see id.* § 3053(c)(2). In 2022, the Commission issued Orders approving four of the Authority’s proposed rules—on Racetrack Safety,¹ Enforcement,² Assessment Methodology,³ and Registration⁴—as well as an Order approving a proposed rule modification to the Enforcement rule.⁵

In November 2022, the Act was held to be unconstitutional by the United States Court of

¹ *See* Fed. Trade Comm’n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity & Safety Auth. at 2, ___ F.T.C. ___ (Mar. 3, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-3-3_for_publication.pdf.

² *See* Fed. Trade Comm’n, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity & Safety Auth. at 1, ___ F.T.C. ___ (Mar. 25, 2022), <https://perma.cc/H9SJ-F9WA>.

³ *See* Fed. Trade Comm’n, Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity & Safety Auth. at 2, ___ F.T.C. ___ (Apr. 1, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Order%20re%20HISA%20Assessment%20Methodology.pdf.

⁴ *See* Fed. Trade Comm’n, Order Approving the Registration Rule Proposed by the Horseracing Integrity & Safety Auth. at 2, ___ F.T.C. ___ (June 29, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderRegistrationRuleFinal.pdf.

⁵ *See* Fed. Trade Comm’n, Order Approving the Enforcement Rule Modification Proposed by Horseracing Integrity & Safety Auth. at 2, (Sept. 23, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Order%20re%20HISA%20Enforcement%20Rule%20Modification.pdf.

Appeals for the Fifth Circuit.⁶ At that time, the Authority had submitted, and the Commission had taken public comment on, a proposed rule on Anti-Doping and Medication Control. Because the legal uncertainty created by the Fifth Circuit’s decision could have undermined the Act’s imperative that horseracing rules, including anti-doping rules, be nationally uniform, the Commission disapproved the proposed rule without prejudice to the Authority’s resubmitting it at a later time.⁷

Thereafter, Congress amended the Act to address the constitutional infirmity identified by the Fifth Circuit. The change to the Act is in § 3053(e). Under the previous version of that subsection, the Commission could “adopt an interim final rule, to take effect immediately, under conditions specified in section 553(b)(B) of title 5, if the Commission finds that such a rule is necessary to protect—(1) the health and safety of covered horses; or (2) the integrity of covered horseraces and wagering on those horseraces.” 15 U.S.C. § 3053(e) (2020). Under the new version of that subsection:

The Commission, by rule in accordance with section 553 of title 5, United States Code, may abrogate, add to, or modify the rules of the Authority promulgated in accordance with this Act as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act.⁸

For the avoidance of any doubt about the continuing force and effect of rules approved by the Commission before the recent amendment, the Commission hereby ratifies its previous Orders

⁶ See *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, No. 22-10387, 53 F.4th 869, 884–90 (5th Cir. 2022) (declaring the Horseracing Integrity and Safety Act unconstitutional because the Commission’s inability to modify the Authority’s rules, the Court concluded, runs afoul of the private non-delegation doctrine). A separate matter raising similar issues is presently before the United States Court of Appeals for the Sixth Circuit.

⁷ See Fed. Trade Comm’n, Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity & Safety Auth. (Dec. 12, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_hisa_anti-doping_disapprove_without_prejudice_0.pdf.

⁸ Consolidated Appropriations Act, 2023, H.R. 2617, 117th Cong., Division O, Title VII (2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117hr2617eas2.pdf> (amending 15 U.S.C. § 3053(e)).

approving the Authority's proposed rules.⁹

The Federal Register Notices that published the proposed rules for public comment all mentioned that the Commission is open to receiving petitions from the public for rulemakings and described the method for filing such a petition under Commission Rule 1.31.¹⁰ Those Notices were correct at the time in describing the narrower rulemaking power of former § 3053(e), but they are now outdated. For the avoidance of doubt, this Order clarifies that the Commission now has a broader rulemaking power with respect to horseracing rules such that it can exercise its own policy choices whenever it determines that the Authority's proposals, even if consistent with the Act, are not the policies that the Commission thinks would be best for horseracing integrity or safety. In addition to exercising that power whenever the Commission itself believes that doing so would be necessary or appropriate, the Commission is also open to hearing from interested persons who believe the promulgation, deletion, or modification of a rule is necessary or appropriate. Such persons may file a petition for a rulemaking with the Commission by following the procedures of Commission Rule 1.31.

For the preceding reasons, the Commission RATIFIES its previous Orders approving the Authority's proposed rules on Racetrack Safety, Enforcement (as modified), Assessment Methodology, and Registration.

By the Commission, Commissioner Wilson abstaining.

April J. Tabor
Secretary

⁹ See *supra* nn. 1–5. These rules are enforceable except in particular circumstances where enforcement is currently enjoined by court order.

¹⁰ 16 C.F.R. § 1.31.