

**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 ASSESSMENT METHODOLOGY RULE PROPOSED BY  
THE HORSERACING INTEGRITY AND SAFETY AUTHORITY**

**April 1, 2022**

**I. Decision of the Commission: HISA’s Assessment Methodology 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 Assessment Methodology (the “Notice”), which is required by the Act. *See id.* § 3052(f). “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 Assessment Methodology proposed rule is consistent with the Act and the Commission’s procedural rule and therefore approves the proposed rule.

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<sup>1</sup> *See* Fed. Trade Comm’n, *Notice of HISA Assessment Methodology Proposed Rule* (“Notice”), 87 Fed. Reg. 9,349 (Feb. 18, 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 Enforcement rule is consistent with the procedural rule. As with the Commission’s earlier orders approving the Authority’s Racetrack Safety and Enforcement proposed rules,<sup>2</sup> 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>3</sup> The remainder of this Order discusses whether the Enforcement 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 and the Authority’s explanation contained in the Notice, the Authority’s supporting documentation,<sup>4</sup> ten public comments,<sup>5</sup> and the Authority’s response to those comments.<sup>6</sup> In total, the Commission received five comments

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<sup>2</sup> See Fed. Trade Comm’n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and Safety Authority (“Racetrack Safety Order”) 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](https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-3-3_for_publication.pdf); Fed. Trade Comm’n, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Authority (“Enforcement Rule Order”) at 2, \_\_\_ F.T.C. \_\_\_ (Mar. 25, 2022), <https://perma.cc/H9SJ-F9WA>.

<sup>3</sup> See Notice, 87 Fed. Reg. at 9,349 & 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>4</sup> See Horseracing Integrity & Safety Auth., *Methodology Rule Proposal Supporting Documentation*, <https://www.regulations.gov/document/FTC-2022-0014-0002> (containing Equibase data for 2019 showing (1) number of starts and total purses per state and (2) number of starts and total purses per racetrack) (“Equibase Data”).

<sup>5</sup> Public comments, which were accepted until March 4, 2022, are available at <https://www.regulations.gov/docket/FTC-2022-0009/comments>. Although the docket shows eleven comments, two are from the American Association for Laboratory Accreditation, with one of those having no attachment. *Compare* Cmt. of Am. Ass’n for Lab. Accreditation (Feb. 22, 2022), <https://www.regulations.gov/comment/FTC-2022-0014-0003> (no attachment), *with* Cmt. of Am. Ass’n for Lab. Accreditation (“Lab. Accreditation Cmt.”) (Mar. 4, 2022), <https://www.regulations.gov/comment/FTC-2022-0014-0003> (attachment).

<sup>6</sup> The Authority’s response, dated March 14, 2022 (“Authority’s Response”), is available on the Authority’s website, <https://hisaus.org>, and permanently at <https://perma.cc/9H48-FRWL>. The Commission appreciates the Authority’s discussion of the public comments and finds its responses useful, although not controlling or definitive, in evaluating the public comments and the decisional criteria. As it has explained in earlier orders, the Commission’s

from state agencies and five from industry participants, with views ranging from general support to outright opposition.<sup>7</sup>

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 the Commission’s procedural rule.<sup>8</sup> The Commission stated that it would therefore focus on those comments that discuss the statutory decisional criteria: whether the proposed rule is consistent with “the specific requirements, factors, standards, or considerations in the text of the Act and the Commission’s procedural rule.”<sup>9</sup> Nevertheless, the Commission received some comments that were unrelated to whether the proposed rule is consistent with the Act or procedural rule, and those comments have little bearing on the Commission’s determination.<sup>10</sup>

Several recurring concerns expressed by commenters merit only brief mention at the outset; because they were addressed extensively by the Commission’s Racetrack Safety Order, which was published toward the end of this comment period, these commenters may have been unable to benefit from its analysis. Several commenters again criticized the comment period as

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consideration of 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> *Compare* Lab. Accreditation Cmt. at 1 (“We are generally supportive of the proposed rules.”), *with* Cmt. of Thoroughbred Horsemen’s Assocs., Inc. et al. (“Thoroughbred Horsemen Cmt.”) (Mar. 4, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0014-0010> (“[T]he 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.”).

<sup>8</sup> 15 U.S.C. § 3053(c)(2).

<sup>9</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>10</sup> As the Commission previously noted, such comments may still be “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.” Racetrack Safety Order at 4 n.12.

too short.<sup>11</sup> Others again decried the piecemeal submission of proposed rules, which deprives commenters of the ability to review them holistically, or the fact that the Authority has not submitted its bylaws for Commission approval.<sup>12</sup> For the reasons previously given in the Racetrack Safety Order, the Commission finds that these concerns do not identify any inconsistency between the Authority’s Assessment Methodology proposed rule and the Act. Moreover, to address concerns that the statutory timelines prevented commenters from providing comments holistically addressing multiple rules, including how the approved Racetrack Safety rule and this Assessment Methodology rule interact with each other, the Commission has directed the Authority to submit proposed rule modifications to those two rules by March 3, 2023.<sup>13</sup>

The Order turns now to the specific provisions of the Assessment Methodology proposed rule. The Act’s direction to the Authority was to develop a proposed rule containing “a formula or methodology for determining assessments described in section 3052(f).” 15 U.S.C. § 3053(a)(11). Section 3052(f) outlines the assessments that need a methodology.<sup>14</sup> First, by April 2, 2022 and by November 1 of future years, “the Authority shall determine and provide to each State racing commission the estimated amount required from the State—(I) to fund the

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<sup>11</sup> See, e.g., Cmt. of Jared Easterling, Remington Park & Lone Star Park (“Remington Park Cmt.”) (Mar. 4, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0014-0008> (“We will stress here again that the public comment period is extremely short, and we would urge the Commission to extend the public comment and review period to ensure proper review of all comments and input from industry stakeholders.”). As the Commission previously explained, despite these entirely reasonable requests, the Act gives the Commission only 60 days from the date of the proposed rule’s publication by the Federal Register, so the public-comment period “counts against the clock that the Commission is on to make a decision.” Racetrack Safety Order at 5 (identifying this “unforgiving” statutory timeline as the reason the procedural rule encourages informal notice and comment by the Authority before it submits rules).

<sup>12</sup> See, e.g., Remington Park Cmt. at 1. As the Commission previously explained, the Authority’s bylaws were in effect before the Act’s passage and codified in the Act, only future proposed modifications to the Authority’s bylaws need to be submitted to the Commission for approval or disapproval after publication in the Federal Register and public comment. See Racetrack Safety Order at 9–10 & n.27 (citing bylaws adopted September 30, 2020).

<sup>13</sup> See Racetrack Safety Order at 8.

<sup>14</sup> “Initial funding” for the Authority’s operations before July 1, 2022 comes from “loans obtained by the Authority.” 15 U.S.C. § 3052(f)(1).

State's proportionate share of the horseracing anti-doping and medication control program and the racetrack safety program for the next calendar year; and (II) 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). The amount each state pays "shall be based on (aa) the annual budget of the Authority for the following calendar year, as approved by the Board; and (bb) the projected amount of covered racing starts for the year in each State" and "take into account other sources of Authority revenue." 15 U.S.C. § 3052(f)(1)(C)(ii). "Covered racing starts" is undefined, and the Act does not give guidance on how to calculate a "projected amount" of them. It does say that, whenever the Authority proposes to increase the "amount required" from each state, it must notify the Commission, which must "publish in the Federal Register such a proposed increase and provide an opportunity for public comment." 15 U.S.C. § 3052(f)(1)(C)(iv).

State racing commissions have the option to collect and remit the amount required: They can "elect[] to remit fees" if they notify the Authority of their election to do so by May 2, 2022. 15 U.S.C. § 3052(f)(2)(A). This election requires the state racing commission "to remit fees pursuant to this subsection according to a schedule established in rule developed by the Authority and approved by the Commission," 15 U.S.C. § 3052(f)(2)(B), although a state can elect to stop remitting with one year's notice. State racing commissions that make the election to remit fees retain broad discretion on how to collect the funds: "Each State racing commission shall determine, subject to the applicable laws, regulations, and contracts of the State, the method by which the requisite amount of fees, such as foal registration fees, sales contributions, starter fees, and track fees, and other fees on covered persons, shall be allocated, assessed, and collected." 15 U.S.C. § 3052(f)(2)(D).

As for those states where the state racing commission does not elect to remit fees, the Authority collects the fees: “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.” 15 U.S.C. § 3052(f)(3)(A). The Authority must “allocate equitably” the applicable fee “among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate.” 15 U.S.C. § 3052(f)(3)(B). The Authority then assesses the equitably allocated fee on covered persons and collects the fee assessed “according to such rules as the Authority may promulgate.” 15 U.S.C. § 3052(f)(3)(C)(i). State racing commissions that do not elect to remit fees “shall not impose or collect from any person a fee or tax relating to anti-doping and medication control or racetrack safety matters for covered horseraces.” 15 U.S.C. § 3052(f)(3)(D). Principally, these are “the specific requirements, factors, standards, or considerations in the text of the Act” with which the Commission will assess the consistency of the Authority’s Assessment Methodology proposed rule.<sup>15</sup>

Proposed Rule 8510 incorporates definitions from the Act for “Covered Horserace” and “Racetrack” and introduces three newly defined terms that build on one another: “*Projected Starts* means the number of starts in Covered Horseraces in the previous 12 months as reported by Equibase, after taking into consideration alterations in the racing calendar of the relevant State(s) for the following calendar year”; “*Projected Purse Starts* means (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”; and “*Annual Covered Racing Starts* means, for the following calendar year, the

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<sup>15</sup> Notice, 87 Fed. Reg. at 9,351.

sum of: (i) 50 percent of the number of Projected Starts; plus (ii) 50 percent of the number of Projected Purse Starts.”<sup>16</sup>

Proposed Rule 8520 is entitled “Annual Calculation of Amounts Required.” Proposed Rule 8520(a)–(b) provides the processes for state racing commissions to make the election to remit fees<sup>17</sup> and for the Authority to inform those states of each annual amount required, and proposed Rule 8520(d) specifies that such states remit one-twelfth of the annual amount required each month.<sup>18</sup> Proposed rule 8520(f) identifies the physical mailing address and email address to which notices directed to the Authority should be sent.

The methodology for calculating the annual amount required of a state racing commission that elects to remit fees is provided by proposed Rule 8520(c), while proposed Rule 8520(e) specifies the methodology for states that do not elect to remit fees.<sup>19</sup> These two provisions received the most public comments, so this Order reproduces them here:

8520(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

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<sup>16</sup> *Id.* at 9,352.

<sup>17</sup> The Act does not appear to provide a method for states to elect to remit fees after 2022, and neither does the proposed Rule 8520(a): “[T]he State racing commission shall notify the Authority in writing on or before May 2, 2022 of its decision to elect to remit fees.” *Id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

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.

8520(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.<sup>20</sup>

Some commenters denominated proposed Rule 8520(c) as the “interstate” methodology and proposed Rule 8520(e) as the “intrastate” methodology,<sup>21</sup> a useful shorthand this Order will employ. Because the new definitions of proposed Rule 8510 interrelate so directly with the two methodologies described, this Order will discuss the public comments, Authority’s response, and Commission’s findings organized by the two methodologies rather than by numerical rule provision.

**a. Rule 8520(c)—Interstate Methodology**

Proposed Rule 8520(c)’s interstate methodology relies on a proposed definition of “Annual Covered Racing Starts,” which itself relies on the novel proposed definitions of “Projected Starts” and “Projected Purse Starts.” Under the proposed methodology, each state’s fee assessment would be based on Annual Covered Racing Starts, considering both “Projected Starts” and “Projected Purse Starts.”

Projected Starts is defined as the number of times that covered horses are projected to run in covered horseraces (races of Thoroughbreds on which wagers are placed) in the coming year (based on the previous year’s number of starts as reported by an industry organization, Equibase).<sup>22</sup>

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<sup>20</sup> *Id.* at 9,352–53.

<sup>21</sup> *See, e.g.,* Thoroughbred Horsemen Cmt. at 1.

<sup>22</sup> Covered horseraces are those that involve wagering on “covered horses,” which are, as of the Act’s passage, Thoroughbreds that have been timed in a workout and not yet retired, but in the future covered horses may include

Projected Purse Starts relies on Equibase data for starts and total purses. By incorporating purses alongside Projected Starts into its definition of Annual Covered Racing Starts, the Authority’s proposed interstate methodology assesses higher fees to states with bigger purses as well as to those with more starts. “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. For example, 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.”<sup>23</sup> The Authority contended that using only Projected Starts would have been unfaithful to the Act, whose “requirements for proportionality among States, equitable allocation among Covered Persons within each State and the requirement imposed on the Authority to establish by rule ‘a formula or methodology for determining assessments’ demonstrate that basing allocations on starts alone would not meet the full requirements of the Act.”<sup>24</sup>

A final component of the proposed interstate methodology, in the final proviso of proposed Rule 8120(c), is a cap on any state’s amount so that no state needs to pay more than 10% of its total purse. The Authority justified this cap, in the Notice, as necessary to “avoid an inequitable or skewed allocation.”<sup>25</sup>

Nine of the ten commenters addressed the proposed interstate methodology, including all five state racing commissions. The California Horse Racing Board (“California Board”) noted that, until the Authority sets its budget, it is impossible to know whether states might hit the 10%

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other kinds of horses depending on the affirmative election of a state racing commission or a “breed governing organization.” 15 U.S.C. § 3051(4)–(5).

<sup>23</sup> Notice, 87 Fed. Reg. at 9,350. *See also id.* & n.13 (“Higher purses greatly influence the ability of Covered Persons to bear costs. It is also anticipated that stakes races and graded stakes races will have higher testing costs.”)

<sup>24</sup> *Id.* at 9,350 n.14.

<sup>25</sup> *Id.* at 9,350 n.16.

cap, which the California Board “doubts meets the Commission’s criteria that the proposed rule is consistent with the Act.”<sup>26</sup> Its comment reiterated the Act’s three express considerations for the interstate assessment, which were the annual budget as approved by the Board, the projected amount of covered racing starts, and other sources of Authority revenue: “Whether ultimately equitable or not, the Act only refers to covered racing starts. In contrast, the Authority’s proposed formula considers total purses, . . . which is not a basis of fee calculation under the Act.”<sup>27</sup> The California Board parsed the Act and concluded that the Authority’s references in the Notice to statutory language such as “proportionate share” and “equitably” were inapposite to the question of how to calculate each state’s allocation. Ultimately, the California Board “agrees that there are more equitable ways to assess fees than what was designated in the Act, [but] . . . the Authority is usurping its powers and is promulgating a rule inconsistent with the Act.”<sup>28</sup>

The Florida Division of Pari-Mutuel Wagering within its Department of Business and Professional Regulation (“Florida Division”) shared similar thoughts, concluding that the proposed interstate methodology “unfairly and arbitrarily assesses costs on states far beyond what is provided in the” Act “and doesn’t contain any ability for states to contest HISA’s budget or the ultimate cost assessment.”<sup>29</sup> The Florida Division stated that the proposed interstate methodology “focuses on a metric that is not part of the Act’s basis of calculation of fees—purses.”<sup>30</sup> The Florida Division similarly argued that “the legislature has emphasized the need for large purses and supplemented purses with funds from other areas of gaming,” so in its view

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<sup>26</sup> Cmt. of Scott Chaney, Exec. Dir., Cal. Horse Racing Bd. (Mar. 3, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0014-0004>.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> Cmt. of Louis Trombetta, Dir., Fla. Div. of Pari-Mutuel Wagering, Dep’t of Bus. & Prof. Regulation (Mar. 4, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0014-0011>.

<sup>30</sup> *Id.*

the proposal “arbitrarily punishes states with large purses.”<sup>31</sup> The Florida Division also expressed alarm at the 10% cap and especially the effect it will have on large-purse states in the future: “[O]nce the Authority’s budget reaches a certain amount, it is a guarantee that states with greater purses will take on even more of a financial responsibility for funding the [A]uthority than originally contemplated.”<sup>32</sup>

The Indiana Horse Racing Commission (“Indiana Commission”) concurred, specifically identifying the difficulty of commenting on the proposed interstate methodology “without the release of the underlying budget assumptions.”<sup>33</sup> The Indiana Commission described the Authority’s inclusion of purse in Annual Covered Race Starts as “not equitable” because “one state makes 147% more covered starts than another, but has a per start fee that is 18% lower than the state that races less—this basically rewards poor purse structure and over-racing the horse population at the track.”<sup>34</sup> And the Indiana Commission thought that the 10% cap was “[e]ven less equitable” because it could require high-purse states to subsidize low-purse states.<sup>35</sup>

The Oklahoma Horse Racing Commission (“Oklahoma Commission”) did not object to the use of purse in Annual Covered Race Starts, but it instead raised an objection to the use of Equibase data: “There have been several instances with Equibase reporting inflated numbers in comparison to actual audited track and/or commission records. A section should be added to handle these types of discrepancies for correction by actual audited records.”<sup>36</sup> The Oklahoma Commission also supported the substance of the one pre-submission informal comment that the

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<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> Cmt. of Deena Pitman, Exec. Dir., Ind. Horse Racing Comm’n (Mar. 4, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0014-0012>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Cmt. of Kelly Cathey, Exec. Dir., Okla. Horse Racing Comm’n (“Okla. Comm’n cmt.”) (Mar. 4, 2022), at 2, <https://www.regulations.gov/comment/FTC-2022-0014-0012>.

Authority had received, inquiring about whether states that enter into voluntary agreements with the Authority to conduct certain tasks will get credit for those costs.<sup>37</sup>

The Texas Racing Commission (“Texas Commission”) reiterated many of its previously stated objections to the Act and the Authority.<sup>38</sup> With respect to the Assessment Methodology proposed rule, the Texas Commission objected to the 10% cap as providing “a clear advantage to the four (4) states that currently dominate horse racing: New York, Florida, Kentucky, and California.”<sup>39</sup> The Texas Commission also noted that “the Authority has not provided any loan amounts to be repaid by States nor any annual budget necessary for the Authority to operate.”<sup>40</sup> The Texas Commission joined the California Board, Florida Division, and Indiana Commission in objecting to the definition of Annual Covered Horse Race as going “beyond what Congress intended by including race purses.”<sup>41</sup> The Texas Commission also alleged that some of the Equibase data were inaccurate because they include some horseraces that are not “covered horseraces.”<sup>42</sup>

Four industry commenters also opposed the inclusion of purse in the definition of Annual Covered Horse Race. The Thoroughbred Horsemen’s Associations, Inc. and four other industry participants (“Thoroughbred Horsemen”) provided the most comprehensive comment. They contended that the Act requires that assessments “be proportionally allocated by the number of

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<sup>37</sup> See Notice, 87 Fed. Reg. at 9,351; Okla. Comm’n cmt. at 1. The Oklahoma Commission also reiterated its objections, stated in its previous comments to the Racetrack Safety and Enforcement proposed rules, to the Act’s constitutionality. *See id.*

<sup>38</sup> See Cmt. of Amy Cook, Exec. Dir., Tex. Racing Comm’n (“Tex. Comm’n cmt.”) (Mar. 4, 2022), at 1–3, 6–8, <https://www.regulations.gov/comment/FTC-2022-0014-0012> (proposing that the Federal Trade Commission request statutory authority to administer a cooperative agreement and congressional allocations to fund grants, alleging that the Act violates the anti-commandeering doctrine).

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

racing starts in each State.”<sup>43</sup> The Thoroughbred Horsemen labeled the newly defined term Projected Purse Starts “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).”<sup>44</sup> The Thoroughbred Horsemen further argued that the proposed interstate methodology fails to achieve its own stated goal of “equitable” outcomes, because it “treats similar states differently based on arbitrary factors that the Authority has apparently not considered.”<sup>45</sup> The Thoroughbred Horsemen also shared the objection raised by several states that it is difficult to evaluate the proposal “without knowing the relative costs and anticipated funding allocations in each state.”<sup>46</sup> And they explained their fear that the incentives created by the inclusion of purse in Annual Covered Racing Starts would undermine the Act’s goals because states would run more races for lower purses and distribute money outside the purse structure, which would prove “dangerous to our most vulnerable horses.”<sup>47</sup> The Thoroughbred Horsemen recommended an interim final rule that specifies an interstate methodology using only starts and not purses.<sup>48</sup>

The New York Thoroughbred Horsemen’s Association, New York Racing Association, Inc., and New York Thoroughbred Breeders, Inc. (“New York Horsemen”) wrote “to support and echo a number of critical points” made by the Thoroughbred Horsemen, with which they are affiliated, but also to object specifically to the “disproportionate amount of the financial burden

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<sup>43</sup> Cmt. of Thoroughbred Horsemen’s Assoc., Inc. et al. (“Thoroughbred Horsemen cmt.”) (Mar. 4, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0014-0010>. The Thoroughbred Horsemen also cited to several versions of the Act before the one that was passed, which contained clear language specifying that assessments be based on a base fee “multiplied by the number of racing starts in the State in the previous month.” *Id.* at 5 n.4.

<sup>44</sup> *Id.* at 4. The Thoroughbred Horsemen also identified what they thought were math errors in the Equibase Data. *See id.* at 5 & n.3

<sup>45</sup> *Id.* at 3. The Thoroughbred Horsemen also pointed out that the term “equitably” appears not in the Act’s provisions for interstate allocations but instead in the Act’s provisions for intrastate allocations. *See id.* at 6. And they contended that the significant parts of the Authority’s budget “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.” *Id.* at 8.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 8.

<sup>48</sup> *See id.* at 13.

that will fall on New York racing stakeholders.”<sup>49</sup> The New York Horsemen also echoed the Thoroughbred Horsemen in urging the Commission to adopt an interim final rule.

The Florida Horsemen’s Benevolent and Protective Association (“Florida Horsemen”) echoed the views of other commenters: “There is no provision in the HISA statute to allow for consideration of purses in any given state when allocating cost, nor is there a provision to cap the cost and assess any shortfall to states where the assessment does not rise above the cap.”<sup>50</sup> The Florida Horsemen shared other commenters’ views that it was difficult to assess the proposed interstate methodology without “the ability to review the actual or even estimated HISA budget.” The Florida Horsemen stated a concern about the Assessment Methodology proposed rule’s “cost to the State of Florida,” which “will be high” even though the “cost of doing business and the cost of living are high.”<sup>51</sup>

Finally, the racetracks Remington Park and Lone Star Park (“Remington Park”) expressed concern about the use of Equibase data, “a capitalized term that is not defined in the Rule or the Act.”<sup>52</sup> As with the Oklahoma Commission, Remington Park contended that Equibase data are sometimes wrong and that the methodology needs “a mechanism to reconcile the delta between the actual number of starts and purse money versus the projected numbers initially reported.”<sup>53</sup> Remington Park also shared the complaint of other commenters that it found commenting on the Assessment Methodology proposed rule difficult without knowing the Authority’s projected budget.<sup>54</sup> Unlike most other commenters, however, Remington Park does

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<sup>49</sup> Cmt. of N.Y. Thoroughbred Horsemen’s Assoc. et al. (“N.Y. Horsemen cmt.”) (Mar. 4, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0014-0013>.

<sup>50</sup> Cmt. of Fla. Horsemen’s Benevolent & Prot. Assoc. (“Fla. Horsemen cmt.”) (Mar. 4, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0014-0007>.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> Remington Park cmt. at 1.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *See id.* at 1.

“appreciate the Authority looking to purse money in addition to starts when it determines the allocation of the assessment.”<sup>55</sup> But it objects to the 10% cap as “favorable to New York, Florida, Kentucky, and California.”<sup>56</sup>

The Authority’s response to these comments about its proposed interstate methodology disagreed with the majority of the commenters who contended that the consideration of purses alongside starts was inconsistent with the Act.<sup>57</sup> The Authority described the requirement of § 3053(a)(11) for “a formula or methodology for determining assessments” as a “broad directive.”<sup>58</sup> Its response placed particular weight on § 3052(f)(1)(C)(ii)(I)’s phrase “based on” in the Act’s command that the amount owed be “based on” the Authority’s budget and “the projected amount of covered racing starts for the year in each State.” “If Congress had intended those two factors to constitute the entire and exclusive grounds for calculating assessments, there would have been no reason for it to direct the Authority to develop, and for the FTC to consider and approve, a rule setting forth ‘a formula or methodology for determining assessments.’ ”<sup>59</sup> The Authority relied on three reported decisions from federal courts of appeals for its proposition that “based on” is synonymous with “arising from” and refers to a starting point or foundation—exactly the role, the Authority said, that “covered racing starts” plays in its Annual Covered Racing Starts.<sup>60</sup> It also contended that a contrary reading would lead to “absurd results.”<sup>61</sup>

According to the Authority, the 10% cap was misunderstood by the Texas Commission and Remington Park, whose “contention that New York, Florida, Kentucky and California will

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<sup>55</sup> *Id.* at 2.

<sup>56</sup> *Id.* at 2. Remington Park cites the same data as the Texas Commission. *Compare id. with* Tex. Comm’n cmt. at 4.

<sup>57</sup> See Authority’s Response at 4–5.

<sup>58</sup> *Id.* at 4

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* In a similar vein, the Authority noted: “Curiously, [the Texas and Indiana Commissions] advance a statutory interpretation that will result in higher fees allocated to their states.” *Id.* at 3 n.10.



unfairly benefit from the cap is incorrect.”<sup>62</sup> The Authority’s response explained why by proposing a hypothetical annual budget of \$50,000,000 and using the 2019 Equibase data, in which the beneficiaries of the cap are small-purse states such as Idaho, Montana, North Dakota, Nebraska, Nevada, Oregon, and Wyoming—but those states in total would have their assessments reduced by only \$139,384. The shift in the payments required by the rest of the states would be proportionally small: The “cap would increase Florida’s proportionate share from \$5,073,794 to \$5,088,076, Indiana’s proportionate share from \$1,224,433 to \$1,227,880, Oklahoma’s proportionate share from \$1,287,616 to \$1,291,241, and Texas’s proportionate share from \$826,034 to \$828,359.”<sup>63</sup> In short, the cap is designed to help small-purse states because it is a 10% cap on a state’s assessment compared to the state’s purse, not a state’s purse compared to the national purse (as the Texas Commission and Remington Park inferred).

As for the concerns that the Oklahoma Commission and Remington Park raised about Equibase, the Authority responded: “Equibase is the official supplier of racing information and statistics to America’s Best Racing, Breeders’ Cup, Daily Racing Form, National Thoroughbred Racing Association, The Jockey Club, Thoroughbred Racing Associations of North America, Inc., TVG, and XpressBet,” which represent together more than 85% of the total wagers in the United States and Canada.<sup>64</sup> “Nevertheless, the Authority will consider in future rulemaking whether to include a process that allows a racetrack to challenge the relevant Equibase numbers.”<sup>65</sup>

The Authority explained that the timelines to which some commenters objected are driven by the Act and the Commission’s rules to implement the Act’s deadlines. “The Act

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<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 3.

<sup>65</sup> *Id.*

requires the Authority no later than 90 days before the program effective date of July 1, 2022, to determine and provide to each State racing commission the estimated amounts required from the State to fund HISA,” and “the Authority will comply with the 90-day deadline imposed by Congress.”<sup>66</sup> But because the Commission needs the 60 days that the Act affords it to take public comments on the Authority’s proposed rules, consider those comments, and issue a reasoned decision approving or disapproving those rules, the Commission’s procedural rule requires the Authority to prepare and submit the Assessment Methodology proposed rule well in advance of its statutory budget deadline.<sup>67</sup>

Despite several arguments in comments against considering purses in the definition of Annual Covered Race Starts, the Commission finds that the proposed interstate methodology is consistent with the Act, which requires the Authority to develop “a formula or methodology for determining assessments,” § 3053(a)(11). These amounts owed “shall—(I) be based on—(aa) the annual budget of the Authority for the following calendar year, as approved by the Board; and (bb) the projected amount of covered racing starts for the year in each State; and (II) take into account other sources of Authority revenue,” § 3052(f)(1)(C)(i). The relevant provisions from proposed Rule 8520(c) are that, after the Authority’s Board approves its budget and other sources of revenue are taken into account, “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.”<sup>68</sup> Annual Covered Racing Starts is defined in proposed Rule 8510 as equal parts Projected Starts and Projected Purse Starts, with the latter defined as total purse divided by Projected Starts.<sup>69</sup>

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<sup>66</sup> *Id.* at 2.

<sup>67</sup> *See id.*

<sup>68</sup> Notice, 78 Fed. Reg. at 9,352.

<sup>69</sup> *See id.*

The statutory-consistency question before the Commission is thus whether the methodology of proposed Rule 8520(c) is consistent with the Act’s requirement that it be “based on . . . the projected amount of covered racing starts for the year in each State,” § 3052(f)(1)(C)(ii). The plain meaning of the phrase “based on” confirms that the proposed methodology is consistent with the Act; without a further restriction such as “solely” or “exclusively” in the Act’s text, the phrase is naturally non-exhaustive. Here, “projected amount of covered racing starts” is undefined in the Act, and the Authority chose to define it as Annual Covered Racing Starts, while opponents of its approach would have defined it exclusively as the Authority defined Projected Starts (in other words, no consideration of purses). But the proposed interstate methodology is still “based on” Projected Starts: As a state’s Projected Starts increase its assessment increases, and as a state’s Projected Starts decrease its assessment decreases. Projected Starts are thus the starting point and the foundation of the amount owed.

Public commenters’ arguments in favor of a finding of inconsistency were unpersuasive. The Thoroughbred Horsemen, for example, did not address the key, ambiguous phrase “based on,” although they noted that Projected Purse Starts is a “misnomer” because it represents a financial number rather than starts. This may be true, but it does not compel a finding of inconsistency with the Act.

The Authority’s response persuasively illustrated with examples that the Oklahoma Commission and Remington Park misunderstood the effect of the 10% cap in the proviso to proposed Rule 8520(c)—it does not benefit big-purse states such as California, Florida, Kentucky, and New York but instead will require them to marginally increase their allocations to ensure that no state pays more than 10% of its own total purse in assessments. The other commenters that objected to the 10% cap did not identify an inconsistency with the Act. While

the potential inconsistency of including Projected Purse Starts alongside Projected Starts within the definition of Annual Covered Race Starts merited more discussion, the Commission finds that the minor adjustments that may be required to bring small-purse states' assessments below 10% of their total purses still leave each state's assessment "based on" covered race starts since the small-purse states' reductions "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."<sup>70</sup>

While the Commission concludes that the interstate methodology proposed by the Authority is consistent with the Act, it is worth noting that there are likely multiple methodologies that the Authority could have proposed that would be consistent with the Act. Accordingly, the Commission encourages states that would prefer another methodology to continue engaging with the Authority, which in its response committed to keeping an open mind about the interstate methodology of the Assessment Methodology proposed rule: "The Authority will review [it] on an annual basis to ensure that the formula that forms the basis of the assessments is equitable and, as a part of this review, the Authority will consider the comments that argue otherwise." The Authority's first proposed rule modification to Assessment Methodology is due on March 3, 2023.<sup>71</sup>

**b. Rule 8520(e)—Intrastate Methodology**

Proposed Rule 8520(e)'s intrastate methodology applies in states that do not elect to remit fees under § 3052(f)(2)(A). It builds on proposed Rule 8520(c)'s calculations and then relies on two new numbers: "Total Starts" is "the number of starts in Covered Horseraces in the previous twelve months as reported by Equibase" and "Monthly Starts" is the same number in

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<sup>70</sup> Notice, 87 Fed. Reg. at 9,352 (emphasis added).

<sup>71</sup> See Racetrack Safety Order at 8.

the previous month.<sup>72</sup> The “applicable fee per racing start” that the Authority must calculate and provide monthly under § 3052(f)(3)(A) is calculated by taking the state’s allocation from Rule 8520(c) as though it were remitting fees and multiplying it by Monthly Starts and then dividing it by Total Starts.<sup>73</sup> Each non-remitting state’s monthly allocation owed is the “applicable fee per racing start” multiplied by the Monthly Starts.<sup>74</sup> Section 3052(f)(3)(B) states that the Authority “shall allocate equitably” this monthly allocation owed by collecting it “from among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate.” The Authority decided that it would achieve equitable allocation by collecting directly from the racetracks based on each racetrack’s share of the total purse in that state over the next month.<sup>75</sup> Each racetrack, for its part, must submit an annual proposal to the Authority describing how it will equitably allocate its amount owed among covered persons involved with covered horseraces at the racetrack.<sup>76</sup> If a racetrack fails to timely submit a proposal or the Authority finds the proposal inequitable, the Authority determines the equitable allocation for the racetrack.<sup>77</sup>

The intrastate methodology received fewer comments than the interstate methodology.<sup>78</sup> Remington Park objected that the proposed intrastate methodology “places the burden of collection on the Racetrack.”<sup>79</sup> Remington Park argued that this burden properly belongs with the Authority: “The Authority is responsible for collecting its fees and cannot delegate that

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<sup>72</sup> Notice, 87 Fed. Reg. at 9,352 (proposed Rule 8520(e)(1)).

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* (proposed Rule 8520(e)(2)).

<sup>75</sup> *See id.* (proposed Rule 8520(e)(3)).

<sup>76</sup> *See id.* (proposed Rule 8520(e)(4)).

<sup>77</sup> *See id.*

<sup>78</sup> Comments that might equally apply to both, such as distrust of Equibase data’s reliability, were addressed in the discussion of comments about the interstate methodology.

<sup>79</sup> Remington Park cmt. at 3.

obligation to the racetracks.”<sup>80</sup>

The Florida Horsemen expressed a similar concern: “A racetrack does not have the legal authority to assess fees to Covered Persons or to collect such fees as suggested in the statute (‘foal registration fees, sales contributions, starter fees, and track fees, and other fees on covered persons’).”<sup>81</sup> A conflict of interest is inherent, stated the Florida Horsemen, in “allowing one stakeholder the ability to determine cost for all stakeholders, one that would leave the methodology vulnerable to litigation.”<sup>82</sup> Finally, the Florida Horsemen objected to the use of purse to divide the monthly amount owed among racetracks in a state: “Under no circumstances should purse money be the ONLY factor used to determine the assessment of the cost of HISA. We do not believe it should be a part of the calculation at all. There is no justification, legal or otherwise, for penalizing one racetrack to the benefit of another.”<sup>83</sup>

The Thoroughbred Horsemen identified “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.”<sup>84</sup> The Thoroughbred Horsemen argued that having racetracks take the lead for determining equitable allocation of assessments “sets the stage for discord . . . 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.”<sup>85</sup> The Thoroughbred Horsemen concluded that the intrastate methodology “is squarely inconsistent

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<sup>80</sup> *Id.*

<sup>81</sup> Fla. Horsemen cmt. at 3 (quoting 15 U.S.C. § 3052(f)(2)(D)).

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

<sup>83</sup> *Id.* at 4 (underlining and capitalization in original)

<sup>84</sup> Thoroughbred Horsemen cmt. at 9.

<sup>85</sup> *Id.* (citing 15 U.S.C. § 3004).

with the Act,” which, in their view, places the burden on the Authority to “perform the allocation, assessment, and collection” and requires “per-start allocation” rather than one “based on a purse structure.”<sup>86</sup> The New York Horsemen stated the same concern.<sup>87</sup>

The Authority’s response defended its choice to place the responsibility on covered racetracks to collect fees, subject to its approval of the racetrack’s proposal for equitably allocating assessments among covered persons.<sup>88</sup> As for several commenters’ concerns about conflicts of interest that might arise from assigning racetracks this task, the Authority responded: “Rule 8520(e)(4) does not give the racetracks the unfettered discretion to determine the allocations for Covered Persons. The racetracks are required to submit a proposal of the allocation of the Assessment Calculation among Covered Persons to the Authority.”<sup>89</sup> And the Authority stated that it will approve the proposals only if it determines that the proposal “allocated equitably.”<sup>90</sup> If the Authority finds the standard unmet, then “the Authority determines the Covered Persons Allocation for the applicable racetrack.”<sup>91</sup> The Authority stated that it planned to issue guidance on the subject under 15 U.S.C. § 3054(g).

As for comments that argued that having racetracks collect the equitable allocations is inconsistent with the Act, the Authority replied that “the Act empowers the Authority to collect these fees ‘according to such rules as the Authority may promulgate,’ . . . precisely what Rule 8520(e)(4) does . . . [because] racetracks already have accounting systems in place to collect and disburse money from and to owners, jockeys, and trainers.”<sup>92</sup>

The Commission finds that the Authority’s proposed intrastate methodology is consistent

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<sup>86</sup> *Id.* at 9–10.

<sup>87</sup> *See* N.Y. Horsemen at 5–6.

<sup>88</sup> *See* Authority’s Response at 5–6.

<sup>89</sup> *Id.* at 5.

<sup>90</sup> *Id.* at 6.

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

<sup>92</sup> *Id.* (quoting 15 U.S.C. § 3052(f)(3)(C)).

with the Act. The commenters' contention that, by issuing a rule requiring covered racetracks to collect equitable allocations from covered persons under an Authority-approved proposal, the Authority has unlawfully delegated a statutory command is unavailing. Instead, the Authority is exercising the Act's permission for it to "collect such fee according to such rules as the Authority may promulgate." 15 U.S.C. § 3052(f)(3)(C)(i). That the Authority collects the assessed fee only from racetracks instead of from a broader set of covered persons is of no moment. So too for the complaint that the Authority unlawfully delegated the allocation required by § 3052(f)(3)(B)—it retains ultimate control over the equitable allocation, stepping in if a racetrack does not timely propose an equitable allocation or proposes an inequitable allocation, and no provision of the Act conflicts with the Authority-racetrack partnership.

The Commission has previously noted that guidance, which the Authority is permitted to issue and said it plans to here, must be limited to the circumstances outlined in the Act.<sup>93</sup> The same concern arises here with the contemplated guidance concerning equitable allocations in states that elect not to remit fees. If the contemplated guidance is "an interpretation of an existing rule, standard, or procedure of the Authority; or (ii) a policy or practice with respect to the administration or enforcement of such an existing rule, standard, or procedure," that is allowed.<sup>94</sup> Guidance must "not have the force of law."<sup>95</sup> Anything that would have the force of law must be submitted to the Commission for public comment and approval or disapproval.

Two commenters, the Thoroughbred Horsemen and New York Horsemen, raised a plausible inconsistency about the interstate methodology's use of purse information. The Act

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<sup>93</sup> See Racetrack Safety Order at 28 ("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.").

<sup>94</sup> 15 U.S.C. § 3054(g)(1)(A).

<sup>95</sup> 16 C.F.R. § 1.140 (definition of HISA Guidance).



provides that, in states that do not elect to remit fees, “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.” 15 U.S.C. § 3052(f)(3)(A). There is no “based on” in this statutory direction, and the number of racing starts in a state’s preceding month is a direct multiplier. But “the applicable fee per racing start” is not defined elsewhere in the Act. Proposed Rule 8520(e) defines it in a reasonable way that includes taking the most recent month’s starts (“Monthly Starts”) divided by the most recent year’s starts (“Total Starts”) and multiplying that ratio by the amount the state would have remitted if it elected to remit fees. The point of the calculation obligation of § 3052(f)(3)(A) is to facilitate predictable monthly billing (as distinguished from the annual fees remitted by states), not to preclude the consideration of purses. So too the Authority’s decision to use purses to allocate fees to racetracks within a state is reasonable and not precluded by any provision of the Act.

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