

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

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

**ORDER APPROVING THE ENFORCEMENT RULE MODIFICATION PROPOSED BY
THE HORSERACING INTEGRITY AND SAFETY AUTHORITY**

September 23, 2022

I. Decision of the Commission: HISA’s Proposed Modification to Enforcement 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, which is charged with developing proposed rules on a variety of subjects. *See id.* § 3053(a). Its proposed rules and proposed rule modifications take effect only if approved by the Federal Trade Commission. *See id.* § 3053(b)(2). The Authority submitted and the Commission published for public comment in the Federal Register the text and explanation of a proposed modification (the “Notice”)¹ to the Enforcement Rule the Commission previously approved by Order (“Enforcement Rule Order”).² This process is required by the Act for proposed rule modifications. *See id.* § 3053(a). “The Commission shall approve a proposed rule or

¹ *See* Fed. Trade Comm’n, *Notice of HISA Enforcement Proposed Rule Modification* (“Notice”), 87 Fed. Reg. 44393 (July 26, 2022), <https://www.federalregister.gov/documents/2022/07/26/2022-15972/hisa-enforcement-rule-modification>.

² *See* Fed. Trade Comm’n, *Order Approving the Enforcement Rule Proposed by the Horseracing Integrity and Safety Auth.* (“Enforcement Rule Order”), at 1, ___ F.T.C. ___ (Mar. 25, 2022), <https://pema.cc/H9SJ-F9WA>; *see also* Fed. Trade Comm’n, *Notice of HISA Enforcement Proposed Rule*, 87 Fed. Reg. 4023 (Jan. 26, 2022), <https://www.federalregister.gov/documents/2022/01/26/2022-01663/hisa-enforcement-rule> (containing text of Enforcement Rule as proposed by Authority).

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 proposed rule modification to the Enforcement Rule is consistent with the Act and with the Commission’s procedural rule and therefore approves the proposed rule modification.

II. Discussion of Comments and the Commission’s Findings

Under the Act, the Commission must approve a proposed rule or rule modification 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 modification to the Enforcement Rule is consistent with the Commission’s procedural rule. As with the Commission’s previous Orders addressing the Authority’s proposed rules,³ this finding formally confirms that the Authority’s submission of this proposed rule modification was consistent with the FTC’s procedural rule.⁴ The remainder of this Order discusses whether the proposed rule modification is “consistent with” the Act.

In deciding whether to approve or disapprove the Authority’s proposed rule modification, the Commission reviewed the Act’s text, the proposed rule modification’s text and the Authority’s explanation contained in the Notice, the Authority’s supporting documentation,⁵ the

³ See Enforcement Rule Order at 1; Fed. Trade Comm’n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity & Safety Auth. (“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; 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; Fed. Trade Comm’n, Order Approving the Registration Rule Proposed by the Horseracing Integrity & Safety Auth. (“Registration Order”) at 2, ___ F.T.C. ___ (June 29, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderRegistrationRuleFinal.pdf.

⁴ See Notice, 87 Fed. Reg. at 44394 & 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 . . .”).

⁵ See Horseracing Integrity & Safety Auth., *Enforcement Rule Proposed Modification Supporting Documentation*, <https://www.regulations.gov/docket/FTC-2022-0044/document> (containing, in Exhibit A, legal authorities on which

public comments from 24 individuals and organizations posted on the docket at <https://www.regulations.gov>,⁶ and the Authority's response to those comments.⁷

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 modification "is consistent with" the Act and the applicable rules approved by the Commission.⁸ The Commission stated in the Notice that it would therefore focus on those comments that discuss the statutory decisional criteria: whether the proposed rule modification is consistent with "the specific requirements, factors, standards, or considerations in the text of the Act and the Commission's procedural rule."⁹ Nevertheless, the Commission received many comments that were unrelated to whether the proposed rule modification is consistent with the Act or with the Commission's procedural rule, and those comments have little bearing on the Commission's determination.¹⁰

the Authority relied; in Exhibit B, the comments that the Authority had received in its informal pre-submission solicitation from horseracing stakeholders; and, in Exhibit C, a document showing in redline the changes to the existing Enforcement Rule in the proposed rule modification).

⁶ Public comments, which were accepted until August 9, 2022, are available at <https://www.regulations.gov/docket/FTC-2022-0044/comments>. Two individuals submitted each submitted two comments, which accounts for why 26 rather than 24 comments appear on the docket. See Cmt. of Catherine Bumgardner Pool (July 27, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0002>; Cmt. of Catherine Bumgardner Pool (Aug. 6, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0013>; Cmt. of Jim Roberts (July 28, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0004>; Cmt. of Jim Roberts (July 28, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0005>.

⁷ The Authority's response, dated August 22, 2022 ("Authority's Response"), is available on the Authority's website, <https://hisaus.org>, and permanently at <https://perma.cc/34MX-JT5G>. 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 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. 54819, 54822 (Oct. 5, 2021).

⁸ 15 U.S.C. § 3053(c)(2).

⁹ Notice, 87 Fed. Reg. at 44399. 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.*

¹⁰ 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

Contents of Proposed Rule Modification

The changes contained in the proposed modification to the Enforcement Rule are principally aimed at narrowing or clarifying the Enforcement Rule’s provisions. As to three provisions, the proposed changes were directed by the Commission in its Enforcement Rule Order. Specifically, in that Order, the Commission directed the Authority (1) to not impose the sanction in Rule 8200(b)(6) until it was narrowed; (2) to propose “guidelines for confidentiality and public reporting at the different stages of the process outlined” in the Enforcement Rule as required by 15 U.S.C. § 3057(c)(2)(G); and (3) to further define the words “device” and “object” as used in Rule 8400(a)(2)’s list of items that were subject to the Authority’s seizure power and to provide a process to return seized items at the conclusion of the enforcement process unless otherwise prohibited.¹¹ The proposed rule modification makes an effort to satisfy these three directives in the Commission’s Order,¹² although it fell short in one important respect, which this Order discusses at its end.

Newly proposed Rule 8380 implements the Act’s requirement that the Authority develop “[g]uidelines for confidentiality and public reporting of decisions.”¹³ The Authority used an International Equestrian Federation guideline as its model and states that the resulting proposed rule “serves the interest of providing greater transparency to the public concerning the adjudication of rule violations.”¹⁴ In particular, the Authority can publicly disclose “(1) the identity of the Covered Person who is the subject of the alleged violation, (2) the identity of any applicable Covered Horse, and (3) the rule violated and, where appropriate, the basis of the

modifications.” Racetrack Safety Order at 4 n.12. Indeed, several of the changes that the Authority proposes in this proceeding were suggested by commenters in response to the Authority’s initial Enforcement Rule proposal.

¹¹ Enforcement Rule Order at 35–36.

¹² See Notice, 87 Fed. Reg. at 44395–96 (discussing the Authority’s effort to satisfy each of the three directives and its rationale behind the proposal ultimately submitted).

¹³ 15 U.S.C. § 3057(c)(2)(G).

¹⁴ Notice, 87 Fed. Reg. at 44395.

asserted violation.”¹⁵ To correct misstatements, the Authority may respond to statements or disclosures made by the person charged with a violation. Proposed Rule 8380 further permits “the Authority to refrain from any public disclosure in situations that would compromise an ongoing investigation or in circumstances in which the Covered Person charged with a violation is a minor.”¹⁶ The proposed rule provision generally provides for public disclosure of relevant details within 20 days of the imposition of a sanction but also earlier than that when the disclosure “concerns a violation or circumstance that poses a serious and imminent risk of harm to Covered Persons, Covered Horses, or the public.”¹⁷

The Authority has also proposed several other changes on its own initiative. As it explains, “Some of these amendments and supplements have been prompted by comments and suggestions received from interested members of the horseracing industry since the rules were filed on December 20, 2021.”¹⁸ One change is to narrow the scope of the access power in Rule 8400(1)(a) to clarify that “the items and locations subject to access must relate to the care, treatment, training, and racing of Covered Horses” and that the power does not permit access to “items and locations unrelated to horseracing.”¹⁹ Another proposed change adds to Rule 8100(g)’s list of sanctionable violations the failure to register under the Commission-approved Registration rule.²⁰ Another small change is the newly proposed Rule 8011, which “specif[ies] that time is calculated under the Rule 8000 Series in calendar days and that, if the last day of a specified period of time falls on a Saturday, Sunday, or holiday, the last day shall be considered to be the next working day following the Saturday, Sunday, or holiday.”²¹

¹⁵ *Id.*

¹⁶ *Id.* at 44395–96.

¹⁷ *Id.* at 44396.

¹⁸ *Id.* at 44394.

¹⁹ *Id.* at 44396.

²⁰ *See id.*

²¹ *Id.* at 44398.

Several proposed changes pertain to Rule 8200, titled “Schedule of Sanctions for Violations; Consent Decrees; Notice of Suspected or Actual Violation.” One adds the language “in proportion to the nature, chronicity, and severity of the violation” to Rule 8200(b) to provide “a rubric or standard to guide discretion in the imposition of penalties.”²² Another modifies Rule 8200(b)(2)(ii) by removing the lower-bound of the fine amount for second offenses, so that, instead of a fine of between \$50,000 and \$100,000, the fine for a second offense is now “up to \$100,000.”²³ Finally, several minor changes are proposed to Rule 8200(d).²⁴

The Authority also proposes a set of clarifying changes to the hearing procedures of the Rule 8300 Series, “Disciplinary Hearings and Accreditation Procedures.” The existing Rule 8300 Series permits stewards to adjudicate violations of certain rules at covered racetracks. The Authority now proposes to amend Rules 8320(a), 8320(b)(3), and 8330(c) to clarify that in the first instance no one but “the stewards shall adjudicate all alleged violations of Rules 2271(b) or 2272 relating to the use of Shock Wave Therapy, violations of Rule 2280 relating to the use of the riding crop, and violations of Rule 2273 relating to the use of other electrical or mechanical devices.”²⁵ Other proposed changes clarify that, in states that have not entered into an enforcement agreement with the Authority, stewards appointed by the Authority adjudicate violations of the Rule 8000 Series and the Rule 2200 Series, including adjudication by one steward even if the state’s law requires a panel of stewards.²⁶ Another proposed change explicitly requires that testimony before a steward or stewards be given under oath and that a

²² *Id.* at 44397.

²³ *Id.*

²⁴ *See id.* (adding “one or more Stewards” to those who can issue Notices of Actual or Suspected Violation; adding “any other relevant factor” to the factors considered in establishing a response time).

²⁵ *Id.*; *see also id.* (“The amendment also makes clear that the stewards shall utilize the hearing procedures of the state jurisdiction in which a violation is alleged to have occurred.”).

²⁶ *See id.*

record of the proceedings be kept.²⁷ The Authority proposes another change “to bring Rule 8330 in conformity with Rules 3000 and 7000 Series, which will establish and set forth the procedures applicable to the National Stewards Panel” and is expected to be filed later this year.²⁸

Rule 8340, “Initial Hearings Conducted Before the Racetrack Safety Committee or the Board of the Authority,” would be amended under the proposed rule modification in several respects. First, an amendment requires that, for proceedings before the Board or Committee, “a record of the proceedings shall be kept in stenographic or recorded form.”²⁹ Second, an amendment clarifies that a party to such a proceeding “is entitled to be represented by counsel at the party’s expense.”³⁰ A third proposed amendment permits the appointment of a “presiding officer [who] may be assigned to exercise various powers similar to those that are performed by administrative law judges in contested proceedings at the state and federal level.”³¹ One such power is to prepare a hearing report with a recommended penalty after briefing.³²

The Authority also proposes several amendments to Rule 8350, “Appeal to the Board.” One proposed amendment would allow the Board to appoint a hearing officer, just as in the proposed amendment to Rule 8340.³³ Another clarifies that the Board has discretion to choose whether to hear oral argument or decide appeals on basis of written submissions alone.³⁴ Finally, an amendment to Rule 8350(c) clarifies that not only the Board but also “any official or body of the Authority to whom the Board delegates the authority” can approve a stay.³⁵

The final set of changes the Authority proposes to the Enforcement Rule apply to Rule

²⁷ *See id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *See id.*

³³ *See id.*

³⁴ *See id.*

³⁵ *Id.*

8360, “Accreditation Procedures,” which applies to racetracks. One change would add “suspension” to the existing mention of the sanction of “revocation” to conform with Rule 2116.³⁶ Others correct a scrivener’s error and change a rule provision to refer to the “Board” rather than the “Authority” for greater accuracy.

Public Comments and Commission Findings

Most of the public comments that the Commission received do not engage in depth with the often narrow and technical amendments in the proposed rule modification. Instead, many of the public commenters object broadly to the Act and its enforcement mechanisms, stating that the Authority’s powers under the existing Enforcement Rule as well as under the proposed rule modification are excessively broad, offensive, unconstitutional, or otherwise unlawful.³⁷

Approximately four-fifths of the public comments are in this vein. The Commission already addressed, in its Enforcement Rule Order, their main contention that the access and seizure powers that exceed the Act’s authorization.³⁸ Under the proposed rule modification, these powers would be somewhat narrowed from those approved in the original Enforcement Rule

³⁶ *See id.*

³⁷ *See, e.g.,* Cmt. of Catherine Bumgardner Pool (July 27, 2022) (“I object to this rulemaking and proposed modification because it violates my constitutional rights against unlawful search and seizure of my property.”), <https://www.regulations.gov/comment/FTC-2022-0044-0002>; Cmt. of Linda A. Robbins, DVM (Aug. 8, 2022) (“The HISA rewrite of Series 8400 Search and Seizure effectively broadens the scope of THE AUTHORITY to violate the 4th Amendment rights of all horsemen by authorizing search and seizure investigations on private properties WITHOUT warrant or probable cause. THE AUTHORITY severely oversteps the legal boundaries of the law in their rule making.”), <https://www.regulations.gov/comment/FTC-2022-0044-0017>; Cmt. of Mark Simonovic (Aug. 8, 2022) (“HISA is unconstitutional, big government overreach by non governmental people! Nobody will ever have the authority to search and seize anything in my home or business. Not HISA’s place. The rules in HISA are laughable at best and the fines imposed are hurting the people within the profession. . . . It’s a slap in the face to American citizens and we are tired of big failing government overreach and dictatorship.”); Cmt. of Dawn Serey (Aug. 8, 2022) (“Rule 8400 continues to violate our 4th amendment rights.”), <https://www.regulations.gov/comment/FTC-2022-0044-0020>; Cmt. of Anonymous (Aug. 9, 2022) (“We do not believe that our horse ownership should require we give up Constitutional rights which we hold very dearly (such as search and seizure of our home or farm).”), <https://www.regulations.gov/comment/FTC-2022-0044-0027>.

³⁸ *See* Enforcement Rule Order at 31–35. As for the commenters’ contentions concerning the constitutionality of a access or seizure, several litigants are pressing such an argument before various federal courts, and the Commission has stated its perspective in legal filings before those courts, so it will not reiterate that here. The Authority’s Response provides its view as well. *See* Authority’s Response at 1–3.

Order, or at least clarified in a way that would prevent them from being applied in a way that could be inconsistent with the Act. In particular, as directed by the Commission in its Enforcement Rule Order, the Authority proposes a narrower scope for its access³⁹ and seizure⁴⁰ powers and provides that seized goods will be returned (unless prohibited by the Act or approved rules).⁴¹ Accordingly, for the reasons set forth in that Order, the Commission finds that the access and seizure powers of Rule 8400 in the narrowed Enforcement Rule are consistent with the Act.

There is one outstanding issue regarding the access power in Rule 8400(a) that requires discussion: Several commenters aver that the qualifying language used in the Authority's proposed rule modification with respect to the access power in fact expands on the scope of access authorized by the Act.⁴² To wit, they contend that the proposed rule modification's use of "relate to" in the phrase "relate to the care, treatment, training, and racing of Covered Horses"⁴³ is broader than the Act's use of "used in" in the phrase "used in the care, treatment, training, and racing of Covered Horses."⁴⁴ The Authority disclaims any intention of expanding the access power beyond the Act's authorization and clarifies in its response to comments:

The Authority did not intend any substantive or practical difference by using "relate to" instead of "are used in." To eliminate any doubt, however, the Authority requests that the Commission expressly state in its order that it approves the proposed modification under the binding interpretation that "relate to" is coterminous with "are used in," so that there can be no dispute that the scope of the access power under the rules does not exceed the scope of the access power under

³⁹ See Notice, 87 Fed. Reg. at 44404 (clarifying in Rule 8400(a)(1)(ii) that the Authority's access to items or facilities with respect to persons who own or perform services on a Covered Horse extends only to those items or facilities that "relate to the care, treatment, training, and racing of Covered Horses," a limitation that in the original Enforcement Rule appeared to apply only to the items and facilities of Covered Persons).

⁴⁰ See *id.* (proposing to clarify in Rule 8400(a)(2) that the only kind of "object or device" that is subject to seizure is one "reasonably believed to have been used in furtherance of the violation or suspected violation.").

⁴¹ See *id.* at 44404 (proposing new Rule 8400(b), which requires seized property to be returned).

⁴² See, e.g., Cmt. of Nat'l Horsemen Benevolent & Prot. Ass'n ("Cmt. of Nat'l Horsemen") 2-3. (Aug. 9, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0028>.

⁴³ Notice, 87 Fed. Reg. at 44404 (defining access power in proposed Rule 8400(a)(1)(i), (ii)).

⁴⁴ 15 U.S.C. § 3054(c)(1)(A)(i).

the Act's express terms.⁴⁵

The Commission, in this Order approving the proposed modification to the Enforcement Rule, agrees with the Authority and clarifies: The phrase "relate to" in Rule 8400(a) is understood to have the same meaning as the Act's phrase "are used in." The Authority is hereby directed to, in its next proposed rule modification to the Enforcement Rule, discussed further at this Order's end, propose to amend the two uses of this phrase to replicate exactly the Act's phrase. In the meantime, as with scrivener's errors the Commission has deemed fixed in approving other proposed rules, the language of this proposed rule modification will operate consistently with the Act and not beyond it.

The remainder of this Order canvasses those comments that discussed in greater depth specific provisions of the proposed rule modification. Newly proposed Rule 8380, which implements the requirements of 15 U.S.C. § 3057(c)(2)(G), contains guidelines for confidentiality and public reporting of decisions. These guidelines generally propose to keep proceedings confidential until a ruling becomes final, but they allow greater disclosure when necessary for safety or to correct others' public statements, while providing greater confidentiality in cases involving minors. Several commenters addressed this newly proposed rule. The Texas Racing Commission objects to newly proposed Rule 8380 as "overly broad" and "modified to preempt any state confidentiality laws."⁴⁶ The Texas Commission states that the "rule proposed flies in the face of the recommended FTC modification guidance,"⁴⁷ particularly the provisions in Rule 8380(d), allowing for the Authority to comment on information publicly disclosed by a person charged with a violation, and Rule 8380(f), allowing disclosure that would

⁴⁵ Authority's Response at 5.

⁴⁶ Cmt. of Tex. Racing Comm'n ("Cmt. of Tex. Comm'n") 2 (Aug. 9, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0026>.

⁴⁷ *Id.* at 7.

otherwise not be allowed when the disclosure concerns a violation or circumstance that “poses a serious and imminent risk of harm to Covered Persons, Covered Horses, or the public.”⁴⁸ Jim Roberts also objects to the newly proposed Rule 8380, writing that allowing “public release of any alleged violation without supporting documentation or due process . . . is similar to leaking of information.”⁴⁹ The Authority disagreed, defending its proposed Rule 8380 as consistent with the Act and advancing “the goal of ensuring fair and transparent horseraces.”⁵⁰

The Commission finds that the proposed Rule 8380 is consistent with the Act. In its Enforcement Rule Order, the Commission identified⁵¹ that the original Enforcement proposed rule lacked this one element required by the Act: “[g]uidelines for confidentiality and public reporting of decisions.”⁵² Now, with the proposed rule modification, the Authority has filled in this missing element. The Authority’s choices of the exact contours of proposed Rule 8380 are reasonable and take into account important considerations around fairness and safety. Proposed Rule 8380 also provides flexibility to the Authority, but this choice is reasonable in light of the Act’s requirement of “[g]uidelines.” The commenters opposed to proposed Rule 8380 did not identify any way in which it was inconsistent with the Act’s requirement for guidelines for confidentiality and public reporting of decisions. Accordingly, the Commission finds that proposed Rule 8380 is consistent with the Act and should be approved.

The National Horsemen’s Benevolent and Protective Association (“National Horsemen”) urges the Commission to disapprove the Rule Series 8200, contending that the fines of “up to \$50,000 and \$100,000 respectively are excessive for first and second violations.”⁵³ The National

⁴⁸ Notice, 87 Fed. Reg. at 44404 (proposing Rule 8380(f)(1)).

⁴⁹ Cmt. of Jim Roberts (July 28, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0004>.

⁵⁰ Authority’s Response at 4.

⁵¹ Enforcement Rule Order at 29.

⁵² 15 U.S.C. § 3057(c)(2)(G).

⁵³ Cmt. of Nat’l Horsemen at 2. The National Horsemen also repeated their “firm and informed belief” that the Act is unconstitutional, that “piecemeal” submission of rules violates the Act, and that the proposed rule modification

Horsemen state that, “when analyzed with the general economic situation and revenue realized from racing for the majority of racehorse owners and trainers, . . . these penalty levels are so excessive that it bears no economic reality and will cause significant harm.”⁵⁴ The North American Association of Racetrack Veterinarians (“NAARV”) also urges the Commission to disapprove the proposed rule modification on similar grounds: “NAARV does not believe that this rewrite represents an improvement over the previous version.”⁵⁵ In particular, NAARV believes that allowing “fines of up to \$50,000 for a first violation or up to \$100,000 for a second violation infringes on the 8th Amendment rights of Horse Racing Participants” because the “median income of a horse trainer is less than \$40,000.”⁵⁶ The Ohio Horsemen’s Benevolent and Protective Association and the Texas Racing Commission share this view.⁵⁷

The objection by these groups to the amended Rule 8200 seems misplaced against the actual changes to the fee structure in the Authority’s proposed rule modification: Instead of a range of \$50,000 to \$100,000, second violations are now simply subject to a fine of up to \$100,000. That is, the second-violation fine floor would be removed, providing the Authority with discretion to issue smaller fines even for repeat offenders when it believes that a fine of less than \$50,000 is warranted.⁵⁸ In any event, these four comments do not identify any way in which the proposed modification to the fee structure for second violations is not consistent with the Act. Accordingly, the Commission finds that the proposed rule modification to Rule 8200 is

“violates basic rights guaranteed by the 4th Amendment.” *Id.* at 1–2. The Commission has addressed these concerns elsewhere, and in any event they do not provide a basis for the Commission to find that the proposed rule modification is not consistent with the Act.

⁵⁴ *Id.*

⁵⁵ See Cmt. of N. Am. Ass’n of Racetrack Veterinarians 1 (Aug. 9, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0030>

⁵⁶ *Id.* NAARV also objects to the access and seizure powers and the Act itself as unconstitutional.

⁵⁷ See Cmt. of Ohio Horsemen’s Benevolent & Prot. Ass’n (Aug. 8, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0015>; Cmt. of Tex. Comm’n at 4.

⁵⁸ The Authority’s Response confirms this: “This modification will provide greater flexibility in assessing a fine in proportion to the nature, chronicity, and severity of the violation.” Authority’s Response at 3.

consistent with the Act and should be approved.

The Texas Racing Commission offers detailed comments on a number of other provisions in the proposed rule modification. First, it states that proposed Rule 8100(g), which adds to the list of sanctionable violations the failure to register as required by the Commission-approved Registration rule, requires one to “waive legal remedies.” It is true that the Act requires persons to register and as a condition of registering “cooperate with the Commission, the Authority, the anti-doping and medication control enforcement agency, and any respective designee, during any civil investigation.”⁵⁹ If such required cooperation is what the Texas Commission objects to, it is objecting to the Act, so it fails to identify a way in which the proposed rule modification is not consistent with the Act.⁶⁰ The Texas Commission’s other objections to Rule 8100 are to provisions that the Federal Trade Commission had already approved and not to anything in the proposed rule modification.⁶¹ So too with its objections to Rules 8200(b)(10), 8200(b)(11), 8200(d), 8320, 8330, 8340, 8350, 8360, and 8370.

The Authority’s proposed rule modification of its Enforcement Rule fixes most of the errors that the Federal Trade Commission in its Enforcement Rule Order identified and directed be fixed as well as makes other improvements that were suggested by horseracing stakeholders and other public commenters. The Commission directed proposed rule modifications to Racetrack Safety and Assessment Methodology by March 1, 2023, which may result in additional improvements to the first set of Commission-approved Authority rules. The Commission encourages the public to continue to weigh in with their views, both in the pre-

⁵⁹ 15 U.S.C. § 3054(d)(3)(A).

⁶⁰ To the extent that the Texas Commission is referencing terms of service that once appeared on the Authority’s website’s registration portal, “Covered persons who registered when these terms were still included in the terms of service will not be held to have waived any substantive rights by registering.” Registration Order at 5 n.10.

⁶¹ See Cmt. of Tex. Comm’n 3.

submission process in which the Authority seeks stakeholder comments and in the formal process following publication of proposed rules and modifications in the Federal Register.

Further Directive to the Authority as to the Seizure Power of Rule 8400(a)(2)

With respect to one aspect of the proposed rule modification, further work remains. The Authority’s proposed rule modification to the seizure power Rule 8400(a)(2) appears to misunderstand the Commission’s concern with the potential for overbreadth. The proposed rule modification continues to list the generic nouns “object” and “device,” albeit now with the qualification that the objects and devices must be “reasonably believed to have been used in furtherance of the violation or suspected violation.”⁶² The Commission previously directed the Authority to “further define[] the meaning of ‘object’ and ‘device’ within proposed Rule 8400(a)(2)” so as to make clear that they are “of a similar nature to ‘medication, drug, substance, and paraphernalia.’”⁶³ In particular, the Commission sought to clarify that “objects” and “devices” eligible for seizure “do not include telephones, computers, or other repositories of electronic data, which are . . . not objects or devices that are themselves evidence of a possible violation,” unlike, for example, drug paraphernalia or illegal riding crops or shock devices.⁶⁴

According to the Authority, further defining “object” and “device” “with precision” was “difficult” and many racing jurisdictions have seizure powers that use similarly generic nouns.⁶⁵ Moreover, the Authority states that, “[i]n doping and medication-violation cases in particular, it

⁶² Notice, 87 Fed. Reg. at 44404 (proposing new Rule 8400(a)(2)).

⁶³ Enforcement Rule Order at 35–36.

⁶⁴ *Id.* at 35.

⁶⁵ Notice, 87 Fed. Reg. at 44396. This is true, and it addresses concerns from commenters about how the seizure power is not provided for in the Act. *See, e.g.*, Cmt. of Jim Roberts (July 28, 2022), <https://www.regulations.gov/comment/FTC-2022-0044-0005> (“The wording of this new rule modification exceeds the limitations of authority granted to the commission. The current wording should be modified to be compliant within the State racing commission authority.”). But the fact that some states use broad terms to define their seizure powers does not resolve the Commission’s concern expressed in the Enforcement Rule Order about the risk of overbreadth for the Authority’s seizure power.

is often found that information concerning medications and drugs administered to horses are stored on computers and phones.”⁶⁶ That may be true, but the Commission specifically instructed the Authority to modify Rule 8400(a)(2) to exclude computers and phones from the scope of the seizure power.

Computers and phones are fundamentally different from “intravenous tubing, oral dosing syringes, needles, nasal gastric tubes, various types of container bags and vials,”⁶⁷ and similar items such as shock devices that themselves may serve as evidence of a violation and thus are properly subject to seizure. Computers and phones, by contrast, are more like “books” and “records,” to which the Authority has access and subpoena power but not seizure power⁶⁸—that is, it can copy or subpoena copies of records but not take them. If a covered person refuses to produce records from a computer or phone that is validly sought by the Authority, the Authority has tools at its disposal including seeking a court order under 15 U.S.C. § 3054(j). Seizure of computers and phones is unnecessary and overbroad.

The Authority is hereby directed to not rely on the words “object” or “device” in Rule 8400(a)(2) to effectuate a seizure. It is further directed to submit within 30 days of this Order a proposed rule modification to define further the type of item subject to a seizure to include items such as “intravenous tubing, oral dosing syringes, needles, nasal gastric tubes, various types of container bags, and vials”⁶⁹ and other items such as illegal whips and shock devices, but it should not include in the proposed definition generic nouns that could be applied to authorize seizure of computers, phones, cars, or other objects that are not themselves evidence of a violation. In its proposed rule modification, the Authority should also correct the potential

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 44404 (defining, in Rule 8400(a)(1), the right of “free access”).

⁶⁹ *Id.* at 44396.

inconsistency it conceded in its response to comments by replacing “relate to” with the Act’s exact phrase in defining the access power of Rule 8400(a)(1). A proposed rule modification addressing only these two matters need not be subject to pre-submission informal public comment under the Commission’s procedural rule, 16 C.F.R. § 1.142(f).

Conclusion

For the preceding reasons, the Commission finds that the Horseracing Integrity and Safety Authority’s proposed rule modification of its Enforcement Rule is consistent with the Horseracing Integrity and Safety Act of 2020 and the Commission’s procedural rule governing submissions under the Act. The Authority is directed not to rely on the words “device” or “object” to effectuate a seizure and to submit within 30 days a proposed rule modification correcting the overbreadth of the seizure power and fixing the definition of the access power to match the Act’s. Subject to those directives, the Enforcement Rule proposed modification is APPROVED.