

**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 REGISTRATION RULE PROPOSED BY THE
HORSERACING INTEGRITY AND SAFETY AUTHORITY**

June 29, 2022

I. Decision of the Commission: HISA’s Registration 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). Those proposed rules and later 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 Register¹ the text and explanation of a proposed rule concerning Registration (the “Notice”). This process 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 Registration proposed rule is consistent with the Act and the Commission’s procedural rule and therefore approves the proposed rule.

¹ *See* Fed. Trade Comm’n, *Notice of HISA Registration Proposed Rule* (“Notice”), 87 Fed. Reg. 29,862 (May 17, 2022), <https://www.federalregister.gov/documents/2022/05/17/2022-10709/hisa-registration-rule>.

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 Registration rule is consistent with the procedural rule. As with the Commission’s earlier orders approving the Authority’s Racetrack Safety, Enforcement, and Assessment Methodology proposed rules,² 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.³ The remainder of this Order discusses whether the Registration 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,⁴ and the two public comments posted on the docket at <https://www.regulations.gov>.⁵

² See Fed. Trade Comm’n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity and 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 Enforcement Rule Proposed by the Horseracing Integrity and Safety Auth., at 2, ___ F.T.C. ___ (Mar. 25, 2022), <https://perma.cc/H9SJ-F9WA>; Fed. Trade Comm’n, Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity and Safety Auth., at 2, ___ F.T.C. ___ (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Order%20re%20HISA%20Assessment%20Methodology.pdf.

³ See Notice, 87 Fed. Reg. at 29,862 & 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 . . .”).

⁴ See Horseracing Integrity & Safety Auth., *Registration Rule Proposal Supporting Documentation*, <https://www.regulations.gov/document/FTC-2022-0028/document> (containing, in Exhibit A, (1) The Kentucky Horse Racing Commission licensing regulation, 810 KAR 3:010, (2) the Kentucky Horse Racing Commission License Application Form, (3) the licensing rules in the Model Rules of the Association of Racing Commissioners International, and (4) The National Racing License Application, and, in Exhibit B, the comments that the Authority had received in its informal pre-submission solicitation from horseracing stakeholders.).

⁵ Public comments, which were accepted until May 31, 2022, are available at <https://www.regulations.gov/docket/FTC-2022-0028/comments>. Only two were received, and neither bears on the substance of the Registration proposed rule, let alone on the Commission’s decisional criteria for approving or disapproving the proposed rule. See Cmt. of Abigail Weaver (May 31, 2022), <https://www.regulations.gov/comment/FTC-2022-0028-0005> (praising generally the Horseracing Integrity and

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.⁶ The Commission stated in the Notice 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.”⁷ The two comments received were unrelated to whether the proposed rule is consistent with the Act or procedural rule.⁸ With this proposed rule, unlike the previous three, the Commission’s staff received phone calls following the close of public comment, which argued that the public comment period was too short. The Commission does not ordinarily consider phone calls made to its staff after the close of public comments, and it did not do so here. Furthermore, the Commission has addressed the concern about a short comment period in its previous orders, which concerned proposed rules that received significantly greater numbers of comments than did Registration, even with the same notice process and comment period.⁹

Safety Act while noting possible confusion over its term “covered person”); Cmt. of David Posey (May 29, 2022), <https://www.regulations.gov/comment/FTC-2022-0028-0004> (criticizing generally the Act but offering to assist in identifying wrongdoers in the industry). As has been true with past proposed rules, the Authority submitted a response to the public comments, though in this case the Authority’s response merely noted that the two public comments did not bear on the Commission’s decisional criteria, which is a legal conclusion that the Commission makes independently of the Authority’s response. Accordingly, the Authority’s response to public comments played no role in the Commission’s decision to approve the Registration proposed rule.

⁶ 15 U.S.C. § 3053(c)(2).

⁷ Notice, 87 Fed. Reg. at 29,865. 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.*

⁸ 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.

⁹ As the Commission previously explained in response to commenters’ requests for additional time for public comment, the Act gives the Commission only 60 days from the date of the proposed rule’s publication in the Federal Register, and that 60 days includes any period set aside for public comment, 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 proposed rules).

The Order turns now to the specific provisions of the Registration proposed rule. The Act's direction to the Authority was to develop a proposed rule that would provide for "Registration of covered persons with Authority." 15 U.S.C. § 3054(d). Section 3054(d) itself then contains four subsections. The first subsection provides that "a covered person shall register with the Authority in accordance with rules promulgated by the Authority and approved by the Commission," which is what the Commission does in this Order, in making registration "a condition of participating in covered races." *Id.* § 3054(d)(1). The second subsection specifies that any registration "shall include an agreement by the covered person to be subject to and comply with the rules, standards, and procedures" that the Commission has approved. *Id.* § 3054(d)(2). The third subsection requires registered persons to cooperate with the Authority, Commission, and their agents as well as to "respond truthfully and completely to the best of the knowledge of the covered person if questioned." *Id.* § 3054(d)(3). The fourth subsection declares that any failure "to comply with this subsection shall be a violation" subject to civil sanctions. *Id.* § 3054(d)(4).

The Authority's Registration proposed rule carries out these four subsections with one significant addition, which is that the Authority proposes to require not only "covered persons" but also "covered horses" to register. *See* Notice, 87 Fed. Reg. at 29,866 ("Rule 9000. Registration of Covered Persons and Covered Horses."). As a general matter, the information required by the Authority for registration is reasonable and, in various ways, less onerous than the information required to register with some state racing commissions. *See id.* at 29,864 ("Ultimately, the Authority opted not to fully duplicate state licensing information requirements . . ."). The requirement that covered horses register will, according to the Authority, "serve the vital function of enabling the Authority to quickly locate a Covered Horse if medication testing

is required or if a Covered Horse’s health and safety becomes a concern and to review the health and vaccine information entered into the Authority’s database at the time of registration.” *Id.* at 29,863.

Neither of the two public comments received identifies any way in which the Registration proposed rule is inconsistent with the Act or with the Commission’s procedural rule, and the Commission does not identify any inconsistency. The Registration proposed rule advances the Act’s substantive goals of improving horseracing integrity and safety by facilitating education about and enforcement of the other approved rules. Because of this Order, all covered persons and covered horses will be required to register with the Authority under the terms published in the Federal Register.¹⁰

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

¹⁰ In particular, the proposed rule specifies that the “Covered Person who registers with the Authority shall agree to be subject to and comply with the rules” of the Authority as approved by the Commission. Notice, 87 Fed. Reg. at 29,867. In keeping with 15 U.S.C. § 3054(d)(2), this agreement includes rules that have yet to be proposed or approved. Several post-comment period callers took particular objection to the possibility of agreeing to be bound by future rules, including, most notably, an anti-doping and medication control rule that is currently in development but has yet to be proposed by the Authority, which has publicly stated its goal of having such a rule in effect by 2023. When participating in a regulated activity, agreeing to be subject to future or changing rules is a commonplace. Any state tomorrow could ban drivers from turning right at all red lights, and no holder of a driver’s license could contend that their existing license entitled them to ignore the new law. So too here: The Authority’s future proposed rules and rule modifications that are approved by the Commission will bind all covered persons upon registration. Regarding another concern raised by callers, the Act allows only those requirements in the text of approved rules or rule modifications to be applied to covered persons by the Authority when the Authority exercises its powers under the Act to seek or impose civil sanctions. Some callers complained about the routine terms of service on the Authority’s registration website, but the Commission has not received those terms let alone approved them, so they cannot form the basis for any action the Authority might take in its role under the Act. Still, the Commission notes that, as of the date of publication of this Order, the terms of service callers found objectionable—those requiring registrants to agree to arbitrate any disputes, bring claims only in certain venues in Kentucky, broadly indemnify the Authority against claims, and waive the right to bring claims as a class—have been removed from the Authority’s website. 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.