

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

**March 25, 2022**

**I. Decision of the Commission: HISA’s 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 (“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 Enforcement (the “Notice”), which is required by the Act. *See id.* § 3057(c)(1). “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 Enforcement proposed rule is consistent with the Act and the Commission’s procedural rule and therefore approves the proposed rule, which will take effect on July 1, 2022.

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<sup>1</sup> *See* Fed. Trade Comm’n, *Notice of HISA Enforcement Proposed Rule* (“Notice”), 87 Fed. Reg. 4,023 (Jan. 26, 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 order approving the Authority’s Racetrack Safety proposed rule,<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> One commenter, the Florida Department of Business & Professional Regulation’s Division of Pari-Mutuel Wagering (“Florida Division”), expressly argued that the submission was inconsistent with the procedural rule, but its concerns do not identify any component of the procedural rule with which the submission was inconsistent.<sup>4</sup> The remainder of this Order discusses whether the Enforcement

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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).

<sup>3</sup> See Notice, 87 Fed. Reg. at 4,023 & 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 Letter from Louis Trombetta, Director, Fla. Div. of Pari-Mutuel Wagering, Dep’t of Bus. & Prof. Reg., (“Fla. Dep’t Bus.”) (Feb. 9, 2022), at 1–2, <https://www.regulations.gov/comment/FTC-2022-0009-0009>. In particular, the Florida Division asserts four ways in which the Authority’s proposed rule does “not comply with the Procedures for Submission of Rules Under the Horseracing Integrity and Safety Act.” *Id.* Those alleged inconsistencies are: (1) that the Enforcement proposed rule references other rules not yet proposed; (2) that it is “vague” for failing to “specify whether the timeframe is computed using calendar or business days and does not specify what happens if the last day falls on a weekend or holiday”; (3) fails to define “Arbitral Body” or “National Stewards Panel”; and (4) “does not enumerate how the rule [specifying a violation for failure to register] would be applied, or how it would be enforceable against unregistered persons.” *Id.* As to the piecemeal nature of the Authority’s proposals the Florida Department (and other commenters) disfavor, the Commission explained in its Racetrack Safety Order that the Act in fact requires the Authority to propose its rules piecemeal and on different timeframes. See Racetrack Safety Order at 6–9 (describing statutory timelines requiring piecemeal submissions and directing Authority to review Racetrack Safety and Assessment Methodology together for proposed rule modifications within one year). The other three objections sound in policy differences and do not identify any portion of the procedural rule with which the Authority’s submission was inconsistent. Another commenter, the Texas Racing Commission (“Texas Commission”), although not expressly identifying an inconsistency with the procedural rule, stated, in a footnote, with respect to the Texas Commission’s view that there could be inconsistency among consent decrees, “No alternatives were proffered for the FTC review although all racing states have alternatives between them.” See Letter from Virginia S. Fields, General Counsel, Tex. Racing Comm’n (“Tex. Comm’n”), (Feb. 8, 2022), at 4 n.17,

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, public comments,<sup>5</sup> and the Authority’s response to those comments.<sup>6</sup> The Commission considered 12 public comments. Some comments were opposed to the proposed rule (sometimes for reasons unrelated to the two decisional criteria<sup>7</sup>) or offered detailed suggestions or asked clarifying questions without stating support or opposition,<sup>8</sup> while others

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<https://www.regulations.gov/comment/FTC-2022-0009-0005>. This statement could allude to the procedural rule’s requirement that the Authority’s submission include a “description of any reasonable alternatives to the proposed rule or modification that may accomplish the stated objective.” 16 C.F.R. § 1.142(a)(3). But there is no inconsistency here. In the Notice, the Authority described why it sought “flexibility in developing decrees,” Notice, 87 Fed. Reg. at 4,027, as its preferred alternative to what Texas would have liked—“a strictly defined process for consistency of application,” Tex. Comm’n at 4. The procedural rule’s requirement that the Authority describe alternatives is not a mechanistic requirement that it exhaustively describe every possible alternative—here, the two reasonable alternatives identified were to be more prescriptive or less prescriptive with respect to consent decrees, and the Authority identified why, even if the Texas Commission and other commenters disagreed, it favored flexibility over the reasonable alternative of strict consistency. A similar inference could be drawn that another commenter, the Thoroughbred Horsemen’s Association, Inc. et al., implicitly identified an inconsistency with the procedural rule when it described the “procedural rule [as] requir[ing] a significant amount of information to justify rules, including evidence.” Letter from Alan M. Foreman, Thoroughbred Horsemen’s Associations, Inc. et al. (“Thoroughbred Horsemen”), (Feb. 9, 2022), at 2, <https://www.regulations.gov/comment/FTC-2022-0009-0010>. The Commission previously addressed this concern from other commenters. *See* Racetrack Safety Order at 2 n.3 (describing the procedural rule as modeled on the Administrative Procedure Act, which requires a “concise general statement,” 5 U.S.C. § 553(c)).

<sup>5</sup> Public comments, which were accepted until February 9, 2022, are available at <https://www.regulations.gov/docket/FTC-2022-0009/comments>.

<sup>6</sup> The Authority’s response, dated February 21, 2022 (“Authority’s Response”), is available on the Authority’s website, <https://hisaus.org>, and permanently at <https://perma.cc/7GVR-3XR6>. 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. Considering 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. The Act’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> *See, e.g.*, Letter from U.S. Trotting Ass’n (Feb. 8, 2022), at 1–4, <https://www.regulations.gov/comment/FTC-2022-0009-0004> (alleging constitutional defects with the Act); Letter from Kelly Cathey, Exec. Dir., Okla. Horse Racing Comm’n (“Okla. Comm’n”) (Feb. 9, 2022), at 1–2, <https://www.regulations.gov/comment/FTC-2022-0009-0011> (same).

<sup>8</sup> *See, e.g.*, Letter from Ky. Horse Racing Comm’n (“Ky. Comm’n”) (Feb. 7, 2022), <https://www.regulations.gov/comment/FTC-2022-0009-0003> (more than 20 specific suggestions); Letter from Humane Soc’y of U.S. (“Humane Soc’y”), (Feb. 9, 2022), <https://www.regulations.gov/comment/FTC-2022-0009-0006> (asking four clarifying questions).

expressed overall support for the proposal.<sup>9</sup> In total, the Commission heard from seven state agencies, four industry groups or companies, and one animal-welfare organization.

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>10</sup> The Commission stated that it would therefore focus on those comments that discussed the statutory decisional criteria: whether the proposed rule was consistent with “the specific requirements, factors, standards, or considerations in the text of the Act and the Commission’s procedural rule.”<sup>11</sup> Nevertheless, the Commission received many 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>12</sup> In this Order, the Commission canvasses the most weighty substantive comments it received, including many that do not directly address the statutory criteria, and the Authority’s responses to them, but it does not delve into every issue raised by commenters, especially when unrelated to the statutory criteria.

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 issued after this comment period closed, these commenters were unable to benefit

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<sup>9</sup> See, e.g., Letter from Scott Chaney, Director, Cal. Horse Racing Bd. (“Cal. Bd.”) (Feb. 3, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0009-0002> (expressing enthusiasm for the Act’s implementation and providing constructive suggestions to four rule provisions).

<sup>10</sup> 15 U.S.C. § 3053(c)(2).

<sup>11</sup> Notice, 87 Fed. Reg. at 4,027. 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>12</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.

from its analysis. Several commenters again criticized the comment period as too short.<sup>13</sup> Others again decried the piecemeal submission of proposed rules, which deprives commenters of the ability to review them holistically.<sup>14</sup> And another raised again the question of whether the Authority’s bylaws are invalid because they have not been published for public comment.<sup>15</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 Enforcement proposed rule and the Act. Moreover, to address concerns that the statutory timeline prevented commenters from providing comments holistically addressing all the rules, including how the Racetrack Safety and Assessment Methodology rules interact with each other, the Commission directed the

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<sup>13</sup> See, e.g., Letter from Jared Easterling, Remington Park & Lone Star Park (“Remington Park”) (Feb. 9, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0009-0013> (“However, we will stress again that the public comment period is extremely limited, 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.”); Letter from Andy Belfiore, Exec. Dir., Fla. Horsemen’s Benevolent & Prot. Ass’n (“Fla. Horsemen”) (Feb. 9, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0009-0007> (“We would petition the Commission to provide an extended comment period when additional rules are posted.”). 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>14</sup> See, e.g., Fla. Dep’t Bus. at 1 (“However, we are concerned that the HISA rules have not been released in their entirety.”); Letter from Thomas F. Chuckas, Jr., Director, Bureau of Thoroughbred Horse Racing, Pennsylvania State Horse Racing Commission (“Pa. Comm’n”) (Feb. 9, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0009-0008> (“First, the PHRC is concerned with the Authority’s ongoing piecemeal submission of regulations which makes a thorough, comprehensive and meaningful review nearly impossible.”); Okla. Comm’n at 2–3 (“HISA has submitted to the Commission only a subset of the rules that the Statute requires. . . . HISA has been delayed in submitting its anti-doping and medication-control rules because HISA failed to reach an agreement with the United States Anti-Doping Agency.”). As the Commission previously explained, the Act not only permits but expressly requires seriatim submission of proposed rules by the Authority to the Commission. See Racetrack Safety Order at 7–8. As for the Authority’s failure to submit a proposed rule on anti-doping and medication-control because of the incomplete negotiations with the U.S. Anti-Doping Agency, the Commission, in the Notice, observed that “cross-references to forthcoming rule proposals will be effective if such rules are proposed by the Authority and approved by the Commission under the same process as this proposed rule.” Notice, 87 Fed. Reg. at 4,028 n.15. Despite the Act’s piecemeal start-up phase, the Commission recognized commenters’ “reasonable desires” to look at rules holistically and accordingly directed the Authority to submit proposed rule modifications to both Racetrack Safety and Assessment Methodology (if approved) by March 3, 2023. The Commission anticipates providing further direction to the Authority with respect to the schedule and substance of submissions of proposed rule modifications following the program effective date of July 1, 2022.

<sup>15</sup> See Remington Park at 1. The Commission previously explained that, because 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).

Authority to submit proposed rule modifications to those two rules by March 3, 2023.<sup>16</sup>

This Order turns now to the specific provisions of the Enforcement proposed rule. The Act’s direction to the Authority is to develop an Enforcement proposed rule that would cover two main subjects: “(A) rules for safety, performance, and anti-doping and medication control results management; and (B) the disciplinary process for safety, performance, and anti-doping and medication control rule violations.” 15 U.S.C. § 3057(c)(1). The rule “shall include” seven elements: “Provisions for notification of safety, performance, and anti-doping and medication control rule violations”; “Hearing procedures”; “Standards for burden of proof”; “Presumptions”; “Evidentiary rules”; “Appeals”; and “Guidelines for confidentiality and public reporting of decisions.” *Id.* § 3057(c)(2)(A)–(G). Finally, the rule “shall provide for adequate due process, including impartial hearing officers or tribunals commensurate with the seriousness of the alleged safety, performance, or anti-doping and medication control rule violation and the possible civil sanctions for such violation.” *Id.* § 3057(c)(3). 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 Enforcement proposed rule.<sup>17</sup>

**a. Rule 8100—Violations**

Proposed Rule 8100 forbids ten practices as violations, which are, in broad strokes: (1) the failure to cooperate with the Authority during an investigation; (2) failure to respond truthfully to a question of the Authority; (3) tampering, interference, or intimidation; (4) aiding and abetting violations of the Racetrack Safety rule; (5) issuing threats to discourage reporting of a Racetrack Safety violation; (6) failure to comply with an order of the Authority; (7) failing to register with the Authority, provide truthful information, or provide timely updates; (8)

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<sup>16</sup> See Racetrack Safety Order at 9.

<sup>17</sup> Notice, 87 Fed. Reg. at 4,027.

committing fraud or misrepresentation in connection with the care of a horse; (9) failure to remit fees (for states that elect to remit fees); and (10) failure to collect equitable assessments (by racetracks in states that do not elect to remit fees).<sup>18</sup>

Five commenters offered specific feedback on proposed Rule 8100. The Kentucky Horse Racing Commission (“Kentucky Commission”) suggested “interference” replace “intentional interference” in proposed Rule 8100(c) because “it can be difficult to prove mens rea.”<sup>19</sup> The Kentucky Commission had the same concern with proposed Rule 8100(d) and further encouraged that the word “attempting” be used instead of “seeking” in Rule 8100(e). The California Horse Racing Board (“California Board”) questioned whether “covering up” is redundant alongside “aiding, abetting, conspiring” in proposed Rule 8100(d).<sup>20</sup> The Pennsylvania State Horse Racing Commission (“Pennsylvania Commission”) commented on proposed Rule 8100(f)–(g), asserting that “pertaining to a racing matter or investigation” is broader than the Authority’s jurisdiction and that similarly the Authority encroaches on state territory by defining a “failure to register” as a violation when states are the issuers of licenses.<sup>21</sup> The Florida Division also expressed concern with proposed Rule 8100(g)’s registration requirements.<sup>22</sup> Finally, the Texas Commission objected to the Authority’s narrative description, in explaining why failure to remit fees or collect assessments should be a violation under Rule 8100(i)–(j), of itself as having a “unique role” because, in the Texas Commission’s view, the Authority is merely “[d]uplicating the state racing commission’s role.”<sup>23</sup>

The Authority’s Response covered each of these comments except the Texas

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<sup>18</sup> *See id.* at 4,028 (proposed Rule 8100(a)–(j))

<sup>19</sup> Ky. Comm’n at 1.

<sup>20</sup> Cal. Bd. at 1.

<sup>21</sup> Pa. Comm’n. at 2.

<sup>22</sup> Fla. Dep’t Bus. at 2 (“It is unclear from this rule what individuals would be considered to have committed a violation, and what authority HISA has over unregistered individuals.”).

<sup>23</sup> Tex. Comm’n at 4.

Commission’s, which (1) did not object to the proposed rule provision but instead to its narrative description in the Notice, (2) reiterated its policy objection to the enactment of the Act by Congress, and (3) was unrelated to the Commission’s decisional criteria. As to the alternative language proposed by the Kentucky Commission and apparent redundancy raised by the California Board, the Authority noted that its proposed language comes directly from the Act, namely 15 U.S.C. § 3057(a)(2)(I)(i) (“intentional interference”), § 3057(a)(2)(K) (“covering up”; “intentional”), and § 3057(a)(2)(L) (“seeking”).<sup>24</sup> Responding to the Pennsylvania Commission’s concern about “racing matter” being vague or overbroad, the Authority both defended the choice as present in many state racing laws (even if not in Pennsylvania’s) and expressed an openness to considering alternatives: “[T]his comment will be taken into consideration by the Authority and may be addressed in future rulemaking.”<sup>25</sup> As for the Pennsylvania Commission’s and Florida Division’s concern about registration requirements, the Authority responded that only those who are defined as “Covered Persons” under the Act are required to register and that those who commit the violation of failing to register are then subject to the disciplinary procedures of proposed Rule 8300.<sup>26</sup>

The Commission finds that proposed Rule 8100 is consistent with the Act. The phrases used in the proposed rule provisions to which commenters objected are drawn directly from the Act, with the exception of “racing matters,” a term that the Authority will revisit but that, even if not used in Pennsylvania’s state laws, is not inconsistent with the federal Act. No commenter identified any way in which the proposed rule provisions are inconsistent with the Act.

**b. Rule 8200—Schedule of Sanctions for Violations; Consent Decrees; Notice of Suspected or**

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<sup>24</sup> See Authority’s Response at 3.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> See *id.*



### ***Actual Violation***

Proposed Rule 8200 outlines the schedule of sanctions for violations, provides that violations may be resolved through consent decrees, and specifies the contents of notifications of suspected or actual violations contemplated by 15 U.S.C. § 3057(c)(2)(A). It specifically exempts from its purview violations of a future rule on anti-doping and medication control, which the Authority has denominated as the Rule 3000 Series and has not yet proposed (and which presumably will come with its own schedule of sanctions for violations).<sup>27</sup> The proposed schedule includes fine ranges of up to \$50,000 for a first-time violation and of between \$50,000 and \$100,000 for repeat violators or for violations that pose “an actual or potential threat of harm to the safety, health, and welfare of Covered Persons, Covered Horses, or the integrity of Covered Horseraces.”<sup>28</sup> It also contemplates temporary or permanent bans on registration, suspensions, cease-and-desist orders, forfeiture of purse money and disqualification, censure, and other remedial actions or sanctions.<sup>29</sup> The Authority and a Covered Person may enter a consent decree: “The Authority shall have the discretion to enter into a consent decree or other similar agreement with a Covered Person as necessary to promote the safety, welfare, and integrity of Covered Horses, Covered Persons, and Covered Horseraces.”<sup>30</sup> Finally, proposed Rule 8200(d) provides for a “Notice of Suspected or Actual Violation” that identify the potential violation, its factual basis, and a deadline for a written response, to include an admission or denial, its factual basis and all relevant details, and any remedial plan proposed.

Three industry groups and six state agencies addressed proposed Rule 8200. Five

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<sup>27</sup> See Notice, 87 Fed. Reg. at 4,028–29.

<sup>28</sup> *Id.* at 4,028.

<sup>29</sup> See *id.* at 4,028–29.

<sup>30</sup> *Id.* at 4,029.

commenters<sup>31</sup> expressed opposition to or confusion about the multiple entities listed and the cross-reference in proposed Rule 8200(b) to a yet-to-be-proposed Rule 7000 Series: “The Authority, the Racetrack Safety Committee, the stewards, any steward or body of stewards selected from the National Stewards Panel, or an Arbitral Body, after any hearing required to be conducted in accordance with the Rule 7000 Series and upon finding a violation or failure to comply with the regulations of the Authority, . . . may impose” sanctions from among twelve options listed.<sup>32</sup> Remington Park feared that these entities “can sanction Covered Persons without having a hearing,” objected to the idea that they could impose “any other sanction” under the catchall of proposed Rule 8200(b)(12), and suggested 20 days instead of 7 days as the default response period as well as further explication of “how service on Covered Persons and the Authority will be determined.”<sup>33</sup> Several industry commenters criticized the \$50,000 minimum penalty for second violations as unnecessarily high.<sup>34</sup> One suggested that the Authority classify “abuse of horse” behavior and refer such behavior to criminal authorities, adding such a referral to the list of available sanctions in Rule 8200(b).<sup>35</sup>

The state agencies expressed other concerns,<sup>36</sup> with the Kentucky and Pennsylvania Commissions both providing numerous, detailed suggestions. The Kentucky Commission suggested: that proposed Rule 8200(b) include “potential mitigating circumstances”; that the cross-references be clarified; that stewards be given guidance regarding fines, such as “a list of

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<sup>31</sup> See Remington Park at 2; Cal. Bd. at 2; Fla. Dep’t Bus. at 1–2; Ky. Comm’n at 1; Pa. Comm’n at 2.

<sup>32</sup> Notice, 87 Fed. Reg. at 4,028.

<sup>33</sup> Remington Park at 2.

<sup>34</sup> See Thoroughbred Horsemen at 3 (“setting a minimum fine of \$50,000 for a second violation unreasonably limits the discretion of the Authority or other entity if a fine less than \$50,000 is warranted”); Fla. Horsemen at 2 (stating that the “minimum fines are far too punitive” and suggesting instead of \$50,000 a minimum penalty of \$1,000 for a second offense).

<sup>35</sup> See Thoroughbred Horsemen at 7.

<sup>36</sup> This Order noted earlier the Texas Commission’s disagreement with the Authority’s preference for flexibility instead of strict consistency in developing consent decrees. See *supra* n.4.

factors or a rubric,” which Kentucky does “for each type of medication violation at 810 KAR 8:030”; that the nature of cease-and-desist orders, “remedial or other action,” and censure, all possible sanctions, be clarified; and that proposed Rule 8200(d), regarding notices, “provide more information about what happens after the Covered Person provides his or her response,” such as whether the matter proceeds to a hearing and if so before whom. The Pennsylvania Commission objected: that proposed Rule 8200(b) “is poorly drafted and substantially unclear,” especially with respect to “who is in charge and what process is to be followed on the effective date”; that proposed Rule 8200(b)(3)–(4)’s sanctions of denial, suspension, or revocation of registration usurps the state licensing function; that proposed Rule 8200(b)(5)’s sanction of a “lifetime ban from registration” “is a licensing matter and beyond the Authority’s statutory power”; that both censure and cease-and-desist orders are “unclear”; and that proposed Rule 8200(d), regarding notices, “requires significant amendment, including detailed definitions and description of the process.”<sup>37</sup>

The California Board suggested that “state racing commission” be among the entities with the ability to impose sanctions on covered persons and issue notices to that effect.<sup>38</sup> The Minnesota Racing Commission (“Minnesota Commission”) flagged three language concerns: (1) that “associating” in proposed Rule 8200(b)(6) is “very” broad so should be defined more narrowly; (2) that “may” in proposed Rule 8200(d)(1), concerning notices, “is problematic”; and (3) that proposed Rule 8200(d)(1)(iii) allow additional time to respond for reasons beyond those listed including “illness, consultation with counsel, etc.”<sup>39</sup>

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<sup>37</sup> Pa. Comm’n at 2 (“Is the ‘notice’ process in lieu of an administrative hearing? What are the factors to trigger the use of the notice of violation provision?”).

<sup>38</sup> See Cal Bd. at 1–2.

<sup>39</sup> Letter from Steve May, Exec. Dir., Minn. Racing Comm’n (“Minn. Comm’n”) (Feb. 9, 2022), at 1, <https://www.regulations.gov/comment/FTC-2022-0009-0012>. The Kentucky Commission also raised the first two of these. See Ky. Comm’n at 1–2.

The Authority’s Response explained that it “wishes to provide each of the various adjudicative bodies designated in the rules a wide range of options in determining the sanction most appropriate to the particular case before them.”<sup>40</sup> The rule does not provide for the imposition of a sanction without a hearing, as Remington Park feared.<sup>41</sup> The Authority recognized that proposed Rule 8200(b)’s reference to a “National Stewards Panel” and an “Arbitral Body” depend on later action to become effective because those bodies will be defined in a future proposed rule: “Prior to that time, the Authority will not be utilizing the National Stewards Panel, the Arbitral Body, or the Arbitration Procedures in any enforcement action against a Covered Person.”<sup>42</sup>

As for California’s suggestion to add “state racing commission” to the list of entities that may impose sanctions, the Authority disagreed, because state racing commissions “will not be involved in imposing the sanctions listed in Rule 8200,” and any stewards who are involved will be state stewards acting under an agreement between the Authority and state racing commission.<sup>43</sup> The Authority also disagreed with the Kentucky Commission’s suggestion to identify “potential mitigating circumstances” for stewards to consider in imposing sanctions, noting that they expect the sanctioning entities to do so as a matter of course.<sup>44</sup> As for the Kentucky Commission’s stated confusion about which rule violations are covered by Rule

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<sup>40</sup> Authority’s Response at 4.

<sup>41</sup> *See id.* at 5 (noting that—in addition to the “detailed procedures for the conduct of hearings, including provisions in the nature of appellate review,” in proposed Rule Series 8300—the Act, in 15 U.S.C. § 3058, also provides for appeals to the Commission’s administrative law judge and thereafter the full Commission). The Authority was unpersuaded by Remington Park’s suggestion to delete the catchall provision of proposed Rule 8200(b)(12) but agreed to study whether a 20-day instead of 7-day default schedule should apply to Covered Persons responding to Notices of Suspected or Actual Violation. *See id.* at 8.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> *Id.* The Authority provided the same rationale for keeping proposed Rule 8200(d)’s notice provisions as proposed. *See id.* at 9 (“a reference to a state racing commission would not be appropriate in the Rule 8200(d)”).

<sup>44</sup> *See id.* at 6 (“Courts and other adjudicative bodies routinely consider all of the evidence on record in determining appropriate sanctions, and of necessity their determination in disciplinary hearings includes the consideration of aggravating and mitigating circumstances. The Authority believes the rule is appropriate as written, but the comment will be taken into consideration by the Authority in the future and may be addressed in future proposed rules.”).

8200’s schedule of sanctions, the Authority said that it was clear enough that violations of Rule 8100 and Rule 2000 Series (Racetrack Safety) are covered, but it will endeavor to keep this clear in future proposed rules.<sup>45</sup> The Kentucky Commission’s suggestion of a “list of factors or a rubric” to guide stewards in imposing sanctions was well received: “[T]he Authority will consider in future rulemaking whether to include a list of factors as suggested.”<sup>46</sup>

The Authority agreed with the Minnesota and Kentucky Commissions that its proposed sanction in proposed Rule 8200(b)(6) of barring a violator “from associating with all Covered Persons” missed the mark: “The Authority concurs with the commentators and will consider revision of the rule in future rule modifications.”<sup>47</sup> With respect to the Pennsylvania and Kentucky Commissions’ concerns that the sanctions of a “cease and desist order” and “remedial or other action” in proposed Rule 8200(b)(6)–(7) are unclear, the Authority committed that any sanctions issued “will precisely state the conduct or action that is prohibited” or required.<sup>48</sup> As for these commenters’ lack of clarity about the effect of “censure,” the Authority replied that the “term is widely understood as a statement publicly condemning specified activity, but without imposing a further sanction.”<sup>49</sup> The Authority was unpersuaded by the Pennsylvania Commission’s allegation that sanctions that temporarily or permanently suspend, bar, or revoke registration intrude on the states’ sovereignty.<sup>50</sup>

The Authority defended proposed Rule 8200(d)’s notice provisions. As for commenters’ questions about what happens after the notice and response, the Authority answered that proposed Rule 8300 Series applies, and the existence of a violation is adjudicated using the

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<sup>45</sup> *See id.* (“All additional rules series promulgated in the future by the Authority will make clear whether the Rule Series 8000 applies to that body of rules.”)

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

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

<sup>48</sup> *Id.* at 7.

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 8.

applicable process.<sup>51</sup> The Minnesota Commission thought that proposed Rule 8200(d)(1)'s use of "may" to describe the issuance of a Notice of Suspected or Actual Violation was a defect, but the Authority described it as a feature of prosecutorial discretion: "Both criminal and civil authorities have the discretion to determine whether the facts of a case justify the initiation of enforcement procedures."<sup>52</sup> As for the Minnesota Commission's suggestion to include other reasons beyond the seriousness of the violation or imminence of the risk for extending beyond seven days the time period for a response to a notice, "the Authority will give consideration to modifying or supplementing the response time provisions in future rulemaking."<sup>53</sup>

Finally, the Authority defended as "sound" its proposed ranges of fines for first-time violations, repeat violations, and severe violations, which several industry commenters had criticized as too high, but also committed to remain open to revising them: "[T]hese comments will be taken into consideration by the Authority in the future and may be addressed in future proposed rules."<sup>54</sup> The Authority felt that it did not need to enumerate criminal-enforcement referrals for "abuse of horse" among the sanctions of Proposed Rule 8200(b), as the Thoroughbred Horsemen had suggested: "No specific provision is needed to authorize Authority officials to inform law enforcement authorities of any abuse of horses that rises to the level of criminality. The Authority will contact criminal law enforcement authorities in appropriate circumstances."<sup>55</sup>

The Commission finds that proposed Rule 8200 is consistent with the Act. The list of available sanctions satisfies the Act's requirement of a "a schedule of civil sanctions for

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<sup>51</sup> *See id.* at 8–9.

<sup>52</sup> *Id.* at 9.

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

<sup>54</sup> *Id.* at 10.

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

violations.” 15 U.S.C. § 3052(a)(8). The notice provisions satisfy another requirement of the Act: “Provisions for notification of . . . rule violations.” *Id.* § 3057(c)(2)(A). Proposed Rule 8200 has many provisions that are flexible and designed to be tailored to the facts of each possible violation, but this is in keeping with the § 3057’s emphasis on equitable principles, using words such as “commensurate” to describe the intuition that the amount of process should correspond to the seriousness of the conduct and sanction at issue.<sup>56</sup> Although commenters expressed desires for small and large changes to proposed Rule 8200, none identified any way in which the proposed rule provisions are inconsistent with the Act. Still, many suggested useful additions or clarifications, which the Authority has committed to considering.

The Authority concurred with commenters that the potential sanction in proposed Rule 8200(b)(6), which could “bar a Covered Person from associating with all Covered Persons concerning any matter under the jurisdiction of the Commission and the Authority during the period of a suspension,” was overbroad. Accordingly, the Commission directs the Authority to not impose this sanction on a covered person until such time as the Authority has proposed, and the Commission has approved, a rule modification that is more narrowly tailored.

***c. Rule Series 8300—Disciplinary Hearings and Accreditation Procedures***

Proposed Rule Series 8300 sets forth seven specific rule provisions detailing the processes by which substantive violations are adjudicated, appealed, and punished. These provisions address the requirements of 15 U.S.C. § 3057(c)(2)(B)–(F), such as hearing procedures, standards for burdens of proof, presumptions, evidentiary rules, appeals, and confidentiality and public reporting of decisions, as well as the overarching requirement of § 3057(c)(3) that there be “adequate due process, including impartial hearing officers or tribunals

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<sup>56</sup> 15 U.S.C. § 3057(c)(3).

commensurate with the seriousness of the alleged . . . violation and the possible civil sanctions.” The public comments and the Authority’s responses are summarized below for each provision, followed by the Commission’s findings on the proposed Rule 8300 Series.

### **1. Rule 8310—Application**

No public comments specifically addressed proposed Rule 8310, so the Authority’s Response did not address it.<sup>57</sup>

### **2. Rules 8320—Adjudication of Violations in the Rule 2200 Series<sup>58</sup>**

### **3. Rule 8330—Adjudication of Rule 8100 Violations**

Proposed Rules 8320 and 8330 are similar, covering initial hearings for most violations of Racetrack Safety and Enforcement rules, respectively, as were the comments each received, so this Order addresses them jointly. Proposed Rule 8320 first provides that violations of Rules 2271(b), 2272, 2273, and 2280 of the approved Racetrack Safety rule determined by stewards may be appealed to the Authority’s Board of Directors under proposed Rule 8330.<sup>59</sup> For all other violations of the Rule 2200 Series, the Authority’s Racetrack Safety Committee “may, at its discretion and taking into account the seriousness of the alleged violation and the facts of the case,” conduct a hearing itself or refer the matter to the National Stewards Panel, Arbitral Body, or state stewards for adjudication under state procedures.<sup>60</sup> Proposed Rule 8330 provides the option, like proposed Rule 8320, for the Authority’s Board of Directors to, with respect to possible violations of proposed Rule 8100, conduct a hearing itself or refer the matter to the National Stewards Panel, Arbitral Body, or state stewards.

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<sup>57</sup> See Authority’s Response at 11.

<sup>58</sup> The Kentucky Commission correctly identified a scrivener’s error, see Ky. Comm’n at 2, which the Authority acknowledged, see Authority’s Response at 11.

<sup>59</sup> See Notice, 87 Fed. Reg. at 4,029.

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



Six comments addressed proposed Rule 8320. Remington Park suggested that the “Board” was undefined and objected to the “delegation” of adjudication to the National Stewards Panel.<sup>61</sup> The other five commenters were state agencies. The Florida Division asserted that the reference to “Racetrack Safety Committee” is a scrivener’s error that should be the “Racetrack Safety and Welfare Committee” required by Rule 2121.<sup>62</sup> The California Board suggested that instead of just “Racetrack Safety Committee,” proposed Rule 8320(b) should add “or Board of Stewards.”<sup>63</sup> The Texas Commission objected that there “are no required timeframes for actions involving revocation of racetrack accreditation” and that the “proposed rule grants all adjudicative tribunal decisions to the discretion of the Racetrack Safety Committee without any governmental agency oversight to insure due process.”<sup>64</sup> The Pennsylvania Commission faulted proposed Rule 8320 for failing to “specify the parameters as to how and why the Racetrack Safety Committee ‘in its discretion’ refers matters” and for allowing the referral of a “ ‘federal’ matter . . . to state stewards.”<sup>65</sup> The Kentucky Commission contended that proposed Rule 8320 “should set forth what factors make a case more appropriate for a given venue” to avoid the appearance of “forum shopping.”<sup>66</sup> It advanced the same concern as the Pennsylvania Commission over possibly sending a federal violation to state stewards.<sup>67</sup>

The Authority disagreed with most of these comments: “Board” plainly refers to the Board of Directors of the Authority, which is given that short-form by the Act in 15 U.S.C. § 3052(b); as with other cross-references to not-yet-proposed rules, “the Authority will not utilize the National Stewards Panel in any enforcement action against a Covered Person” until

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<sup>61</sup> See Remington Park at 2.

<sup>62</sup> Fla. Dep’t Bus. at 2.

<sup>63</sup> Cal Bd. at 2.

<sup>64</sup> Tex. Comm’n at 4.

<sup>65</sup> Pa. Comm’n at 3.

<sup>66</sup> Ky. Comm’n at 2.

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

the Rule 7000 Series has been proposed and approved; and the referral of violations of the Authority’s rules to state stewards will occur “only if there is an agreement in place with a state racing commission under which that commission participates in the enforcement of Authority rules.”<sup>68</sup>

The Authority found the forum-selection comments useful and committed to taking them into consideration for future proposed rule modifications.<sup>69</sup> The Authority also provided additional information about how it anticipates approaching those decisions: “[I]n matters concerning complex racetrack surface safety issues, the Committee itself will likely be the venue most appropriate to the case, [whereas c]ases involving complex questions of law might be more suited to the Arbitral Body.”<sup>70</sup>

Three commenters specifically addressed proposed Rule 8330. The Kentucky Commission reiterated its concern about proposed Rule 8320 about venue-selection and having state stewards adjudicate “federal” violations.<sup>71</sup> The Pennsylvania Commission also reiterated its concern about proposed Rule 8320 relating to referring Authority matters to state stewards.<sup>72</sup> Finally, the Thoroughbred Horsemen expressed the concern that “National Stewards Panel” and “Arbitral Body” are undefined and that the “Authority should be required to submit proposed definitions of those terms as part of forthcoming rule submissions, and those panels should include veterinary or other relevant experts.”<sup>73</sup>

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<sup>68</sup> See Authority’s Response at 11–12. The Authority did not specifically address the Florida Division’s assertion of a scrivener’s error, namely its view that instead of Racetrack Safety Committee the Authority meant “Racetrack Safety and Welfare Committee” as required of covered racetracks by Rule 2121. But this was not a scrivener’s error—the Authority meant and correctly named its own Racetrack Safety Committee, a standing Committee required by the Act. See 15 U.S.C. § 3052(c)(2).

<sup>69</sup> See Authority’s Response at 11–12.

<sup>70</sup> *Id.*

<sup>71</sup> See Ky. Comm’n at 2.

<sup>72</sup> See Pa. Comm’n at 3.

<sup>73</sup> Thoroughbred Horsemen at 7.

The Authority’s responses, like the comments, about proposed Rule 8330 were similar to its responses to proposed Rule 8320: “As stated previously in response to similar comments . . . , the Racetrack Safety Committee [sic] will take into account the seriousness of the violation and the facts of the case. An important consideration will be to determine which body has the most expertise to enable it to properly assess the subject matter of the case. If the stewards refer a case to the state stewards in a particular jurisdiction, the stewards will utilize the procedures set forth in that jurisdiction’s regulations.”<sup>74</sup>

#### ***4. Rule 8340—Initial Hearings Conducted Before the Racetrack Safety Committee or the Board of the Authority***

Proposed Rule 8340 provides that initial hearings be conducted, in the case of the Racetrack Safety Committee, by no less than a quorum of the Committee, and, in the case of the Board, by a panel of three of its members appointed by the Board chair. A notice of the hearing, describing its time, place, and nature as well as the violations alleged, must reach its required audience at least 20 days before the hearing. The Committee or Board may require written briefing, and witnesses must testify under oath. “The burden of proof shall be on the party alleging the violation to show, by a preponderance of the evidence, that the Covered Person has violated or failed to comply with a provision of or is responsible for a violation of a provision of the Authority’s regulations.”<sup>75</sup> The technical rules of evidence do not apply, but rules of privilege do. “A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such limited cross-examination as may be required

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<sup>74</sup> Authority’s Response at 12 (mentioning Racetrack Safety Committee, which makes the election under proposed Rule 8320, but presumably meaning the Authority’s Board of Directors, the relevant decisionmaker under proposed Rule 8330).

<sup>75</sup> Notice, 87 Fed. Reg. at 4,030.

for a full and true disclosure of the facts.”<sup>76</sup> Within 30 days of the hearing’s conclusion, the Board or Committee must issue “a written decision setting forth findings of fact, conclusions of law, and the disposition of the matter including any penalty imposed.”<sup>77</sup>

Two industry participants and four state agencies commented on proposed Rule 8340. Remington Park offered five recommendations: define “Board”; remove from proposed Rule 8340(f) the phrase “or failed to comply with a provision of or is responsible for a violation of a provision”; exclude hearsay; “clarify whether parties subject to adjudication can call their own witnesses or compel the attendance of witnesses pursuant to subpoena”; and provide that each written decision include a “notice of appeal rights” with information about how to file an appeal.<sup>78</sup> The Thoroughbred Horsemen objected to the ability of a mere quorum of the Racetrack Safety Committee or a three-member panel of the Board to adjudicate disputes because it’s possible that “no veterinary or other relevant expert may be included on any individual hearing panel.”<sup>79</sup>

The California Board objected that proposed Rule 8340 “completely changes how safety violations are heard” and that the Authority’s Racetrack Safety Committee “is not as well qualified as a jurisdiction’s Board of Stewards to hear these types of cases.”<sup>80</sup> It also proposed replacing the Authority’s proposal of allowing hearsay evidence if it “is of a type that is commonly relied on by reasonably prudent people” with California’s allowance of hearsay “for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Remington Park at 2–3.

<sup>79</sup> Thoroughbred Horsemen at 6.

<sup>80</sup> Cal. Bd. at 2.

actions.”<sup>81</sup> The Minnesota Commission suggested explicitly specifying that a person may be represented by legal counsel.<sup>82</sup>

The Kentucky Commission had “questions about the practicalities of how hearings under the Rule would be conducted,” in particular: “Would these hearing[s] proceed like a stewards’ hearing, or would a designated hearing officer or administrative law judge preside? Additionally, would HISA use its own attorney to present its case to the Safety Committee or the Board?”<sup>83</sup> And the Pennsylvania Commission had its own: “Are the Board members attorneys or will there be a hearing officer/presiding officer present? Are covered persons allowed to appear pro se or must they be represented by counsel? Who determines where the initial matter should be properly before the Board or the Racetrack Safety Committee?”<sup>84</sup>

The Authority responded again that the Act refers to the Authority’s Board of Directors as the “Board.”<sup>85</sup> The Authority defended the fact that some panels of the Board or permutations of a quorum of its Racetrack Safety Committee would not contain an expert in every conceivable factual question to be adjudicated: “It is anticipated that qualified experts will participate as witnesses in adjudications before the various adjudicatory bodies referenced in the Series 8000 Rules.”<sup>86</sup> The Authority rejected Remington Park’s suggestion to exclude categorically all hearsay evidence: “Hearsay evidence is routinely admitted in administrative adjudications, subject to certain requirements and restrictions intended to ensure reliability. Administrative rules or procedures are generally more relaxed than the Rules of Civil Procedure used in state and federal courts.”<sup>87</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *See* Minn. Comm’n at 1.

<sup>83</sup> Ky. Comm’n at 2.

<sup>84</sup> Pa. Comm’n at 3.

<sup>85</sup> *See* Authority’s Response at 12.

<sup>86</sup> *Id.* at 13.

<sup>87</sup> *Id.*

The Authority had a general response to those commenters who sought additional process pertaining “to the role of attorneys and witnesses for the Authority and Covered Persons, and various rules of practice that might be included in the rules,” namely that the “hearings provided in the proposed Rule 8000 Series are not intended to duplicate the full breadth of the federal procedures.”<sup>88</sup> And “a full due process hearing is available on appeal to all Covered Persons, to be conducted by the Commission rather than the Authority.”<sup>89</sup> Still, the Authority expressed openness to consider these comments in developing future proposed rule modifications.<sup>90</sup>

### ***5. Rule 8350—Appeal to the Board***

Proposed Rule 8350 provides that any decision of the entities subordinate to the Authority’s Board of Directors—the Racetrack Safety Committee, state stewards, the National Stewards Panel, or Arbitral Body—is subject to appeal to the Board.<sup>91</sup> So too any decision of a three-member panel of the Board is subject to appeal to the entire Board (minus the three original panelists).<sup>92</sup> Appeals may be taken by a party to the decision, by filing a written request within 10 days of the decision, or on the Board’s own initiative.<sup>93</sup> An appeal does not automatically stay the decision.<sup>94</sup> The standard of review disfavors reversal: “[T]he Board shall uphold the decision unless it is clearly erroneous or not supported by the evidence or applicable law.”<sup>95</sup> The Board can accept, reject, or modify the decision as well as remand it for further proceedings below or conduct its own further proceedings.<sup>96</sup> The final decision of the Board is “the final decision of

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<sup>88</sup> *Id.*

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

<sup>90</sup> *See id.*

<sup>91</sup> *See* Notice, 87 Fed. Reg. at 4,030.

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See id.*

the Authority.”<sup>97</sup>

Four commenters addressed proposed Rule 8350. Remington Park asked for clarification of the word “Board” and an extension from 10 days to 30 days of the deadline to file an appeal from the decision following the initial hearing.<sup>98</sup> The Kentucky Commission suggested that the Authority elucidate “the factors that would inform [the Board’s] choice to review a decision” on its own initiative.<sup>99</sup> The Pennsylvania Commission asked for more information about the “type of hearing” the Board will conduct: Is it “similar to oral argument or is new evidence admissible,” and, if further proceedings are determined appropriate, “is this a *de novo* proceeding or an ‘appellate’ review of the record?”<sup>100</sup>

The Authority responded that it will consider extending the deadline for taking an appeal in future proposed rule modifications.<sup>101</sup> “Board,” here as elsewhere, refers to the Board of Directors of the Authority. Generally, the Board’s appellate review is “in the nature of appellate review,” that is, with oral argument at the Board’s discretion and based on a fixed record developed below in the initial hearing.<sup>102</sup> The Board would decide to hear an appeal on its own initiative if it had reason to think that the standard of review—whether the decision following the initial hearing is clearly erroneous or not supported by the evidence or applicable law—might be met.<sup>103</sup>

## **6. Rule 8360—Accreditation Procedures**

Proposed Rule 8360 provides that any decision by the Authority to deny or revoke a racetrack’s accreditation may be appealed by the racetrack within ten days or heard by the Board

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<sup>97</sup> *Id.*

<sup>98</sup> *See* Remington Park at 3.

<sup>99</sup> Ky. Comm’n at 2.

<sup>100</sup> Pa. Comm’n at 3.

<sup>101</sup> *See* Authority’s Response at 14.

<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

on its own initiative.<sup>104</sup> Unlike with appeals by covered persons under proposed Rule 8350, the “Authority’s order revoking accreditation shall be stayed automatically pending review of the decision by the Authority.”<sup>105</sup> In hearing the appeal, the Authority may “consider any additional information from any source that may assist in the review,” hear a presentation from the racetrack about its remedial efforts, and consider any “factors the Authority deems relevant to its review.”<sup>106</sup> After that, the Authority can deny or revoke a racetrack’s accreditation by a two-thirds vote, reinstate the racetrack’s accreditation “subject to any requirements the Authority deems necessary to ensure that horseracing will be conducted in a manner consistent with racetrack safety and integrity,” impose a fine of no more than \$50,000, require periodic reporting, and prohibit a racetrack from conducting any covered horserace.<sup>107</sup>

Four commenters addressed proposed Rule 8360. The Minnesota Commission suggested that “possible suspension of accreditation” be added to proposed Rule 8360(f)(1)’s list of consequences, which lists only denial and revocation of accreditation.<sup>108</sup> Remington Park urged that a hearing be required “prior to ‘revoking’ any racetrack accreditation. This rule assumes the Authority designees have the authority to revoke a racetrack accreditation without any due process whatsoever.”<sup>109</sup> It further proposed “a distinction between the appeal procedures associated with a revocation and those associated with a denial,” namely that “revocation should proceed under due process procedures subject to appeal.”<sup>110</sup>

The Humane Society of the United States, Humane Society Veterinary Medical Association, and Humane Society Legislative Fund (“Humane Society”), which focused its

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<sup>104</sup> See Notice, 87 Fed. Reg. at 4,030.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 4,030–31.

<sup>108</sup> Minn Comm’n at 2.

<sup>109</sup> Remington Park at 3.

<sup>110</sup> *Id.*



comment on these provisions, asked whether racetracks benefited from too many procedural protections. It posed a series of questions about the reasons the Authority would review a decision to deny or revoke accreditation, the timeline of such a review, the duration of sanctions against racetracks, and the circumstances under which a sanctioned racetrack would be allowed to resume racing.<sup>111</sup> And its submission asked whether “the decision to reinstate or approve accreditation ha[s] to be made by a vote of two-thirds . . . , as with the decision to deny or revoke accreditation?”<sup>112</sup> The Florida Horsemen’s Benevolent and Protective Association (“Florida Horsemen”) also perceived an inequality, pointing out that “there is no minimum fine” for racetracks under proposed Rule 8360(f)(2), whereas covered persons face a minimum fine of \$50,000 for repeat or severe violations.<sup>113</sup>

The Authority responded that many of these questions and objections are answered by viewing proposed Rule 8360 in tandem with Rule 2110 et seq., which provides the accreditation process within the Racetrack Safety rule.<sup>114</sup> “Together, these rules require the Authority to give racetracks notice of non-compliance with the racetrack safety rules, as well as an opportunity to remedy any deficiencies, prior to suspension or revocation of accreditation.”<sup>115</sup> This answered Remington Park’s concern about pre-revocation process. As for Remington Park’s assertion that the due process is lacking overall, the Authority countered that, in “addition to this process, the HISA Act itself provides that a full due process hearing is available to all Covered Persons, including racetracks, on appeal to the Commission.”<sup>116</sup> The Authority specifically complimented the comments provided by the Humane Society as “constructive and insightful, and the Authority

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<sup>111</sup> See Humane Soc’y at 2.

<sup>112</sup> *Id.*

<sup>113</sup> Fla. Horsemen at 2.

<sup>114</sup> See Authority’s Response at 15.

<sup>115</sup> *Id.* (citing Rule 2116).

<sup>116</sup> *Id.*

will consider them in the course of making any necessary modifications or supplements to the accreditation rules.”<sup>117</sup> And the Authority explained that the answer to the Humane Society’s question about whether the two-thirds vote is required only for revocation or denial was “yes.”<sup>118</sup> The Authority did not address the Florida Horsemen’s complaint about the perceived disparate treatment of racetracks and covered persons.

### **7. Rule 8370—Final Civil Sanction**

No public comments specifically addressed proposed Rule 8370, so the Authority’s Response did not address it.<sup>119</sup>

The Commission finds that the proposed Rule 8300 Series is consistent with the Act. Various of its components map directly onto the Act, such as proposed Rules 8310 and 8320, which provide procedures for initial hearings, *see* 15 U.S.C. § 3057(c)(2)(B) (“Hearing procedures.”); proposed Rule 8340(f), which spells out a burden of proof, *see* § 3057(c)(2)(C) (“Standards for burden of proof.”); proposed Rule 8340(g), which describes relaxed rules of evidence, such as allowing hearsay ordinarily relied on by reasonably prudent people, *see* § 3057(c)(2)(E) (“Evidentiary rules.”); and proposed Rules 8350 and 8360, which provide appellate processes, *see* § 3057(c)(2)(F) (“Appeals.”).<sup>120</sup>

Under the Act, the Commission reviews the Authority’s proposals for their consistency with the Act and the Commission’s rule, not for general policy. As with most proposed rule provisions, most comments offered policy recommendations without identifying any

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<sup>117</sup> *Id.*

<sup>118</sup> *See id.* (“All other votes set forth in the rules require a simple majority of a quorum. The members referred to in Rule 8360(f)(1) are members of the Board of the Authority.”).

<sup>119</sup> *See id.* *N.B.*, the Texas Commission mentions proposed Rule 8370, but its complaint is with the whole proposed Rule 8300 Series, which, in its view, is “[e]ssentially giving a private actor adjudicative power over competitors and friends in the industry. This is a far cry from integrity or impartiality in the adjudicative process.” Tex. Comm’n. 5. All that proposed Rule 8370 does is specify that decisions rendered under proposed Rules 8350 and 8360 “constitute a final civil sanction subject to appeal” to the Commission under 15 U.S.C. § 3058. Notice, 87 Fed. Reg. at 4,031.

<sup>120</sup> *Compare* 15 U.S.C. § 3057(c)(2)(B)–(F), with Notice, 87 Fed. Reg. at 4,029–30.

inconsistency between the proposed rule provisions and the Act. With respect to proposed Rule 8300 Series, however, several commenters did assert an inconsistency with the Act by arguing that the Rule 8300 Series in total or in certain aspects would fail to provide due process. Part of the Authority's response, that the "Act itself provides that a full due process hearing [] available to all Covered Persons, including racetracks, on appeal to the Commission," missed the mark.<sup>121</sup> The Act requires "adequate due process," 15 U.S.C. § 3057(c)(3), *not* from the overall statutory scheme including review by the Commission but from "[t]he rules established under paragraph (1)" of § 3057(c), which govern only the Authority's process before any later appeal to the Commission.

Still, the Authority suggested this inaccurate reason to find adequate due process "[i]n addition to" the extensive processes provided, including notice with sufficient information to mount a defense and an opportunity to be heard. As the Supreme Court put it in a famous decision, "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."<sup>122</sup> No commenter raised a serious concern that the Board or its distinguished Racetrack Safety Committee are or will be anything other than "impartial." 15 U.S.C. § 3057(c)(3).<sup>123</sup> These essential hallmarks of due process are present here along with numerous additional protections, from appeal rights for all parties to a super-majority-vote requirement for the revocation or denial of a racetrack's accreditation. That certain formalities are relaxed, such as the formal rules of evidence, is comfortably in keeping with the Act's command that "*adequate* due process" be "commensurate with . . . the possible civil sanctions

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<sup>121</sup> Authority's Response at 15.

<sup>122</sup> *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (internal quotation marks and citation omitted).

<sup>123</sup> *See also Fuentes*, 407 U.S. at 83 (due process requires "an informed evaluation by a neutral official").

for such violation.” *Id.* (emphasis added). Maximum fines for first-time violators are \$50,000 or, for severe violations, \$100,000. If the only available sanction in the schedule the Authority proposed were, say, a lifetime ban from the industry, “adequate due process” would likely require more. But with the sliding-scale approach to discipline evidenced in its proposals, the Authority’s Enforcement proposed rule provides “adequate due process” that is “commensurate” with the available sanctions. As for the Florida Horsemen’s complaint about disparate treatment of covered persons and racetracks, to which the Authority did not respond, it raises no inconsistency with the Act. In any event, such a disparity is hardly irrational: A covered person who commits a violation faces serious sanctions including the possible loss of his or her livelihood, but a racetrack’s shuttering would bring serious consequences to innocent people and companies, such as concession vendors, and inflict harm across the local economy. The Authority’s future proposed rule modifications, informed by the helpful comments, may continue to refine its processes so that it is even better than “adequate.”

The Commission makes a final observation, even though no commenter raised these issues, about two provisions in § 3057(c)(2) without an obvious corollary in the proposed rule provisions.<sup>124</sup> The Commission is uncertain what Congress meant by “presumptions.” 15 U.S.C. § 3057(c)(2)(D). It could possibly refer to the appellate standard of review, as in there is a “presumption” in proposed Rule 8350(f) that the initial decision will stand since the Board “shall uphold the decision unless it is clearly erroneous or not supported by the evidence or applicable law.”<sup>125</sup> Possibly it alludes to the classical criminal-law “presumption of innocence,” inasmuch

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<sup>124</sup> The Act says that the Enforcement rule “shall include” a list of items, most of which are clearly included in the Authority’s proposal. *See* 15 U.S.C. § 3057(c)(2). It is unclear from the context whether “shall” here means “may” or “must,” which is why the use of the ambiguous “shall” is so strongly disfavored. *See* Plainlanguage.gov, *Shall and must*, <https://www.plainlanguage.gov/guidelines/conversational/shall-and-must/> (“ ‘Shall’ is ambiguous” yet still a favorite crutch for legal drafters; Bryan Garner concludes that it is occasionally a synonym for the permissive “may” rather than the mandatory “must.”).

<sup>125</sup> Notice, 87 Fed. Reg. at 4,030

as proposed Rule 8340(f) places the “burden . . . on the party alleging the violation” (similar to the state’s burden to prove guilt).<sup>126</sup> In either case, the Commission is satisfied that the proposed rule provisions are not inconsistent with the Act’s element of “presumptions.”

The Act also lists as an element “[g]uidelines for confidentiality and public reporting of decisions.” 15 U.S.C. § 3057(c)(2)(G). The Commission does not observe any such guidelines in the Enforcement proposed rule. To wit, proposed Rules 8340(i) and 8350(h) provide that written decisions following initial hearings conducted by the Board or Racetrack Safety Committee will be “issue[d] to all parties” and that a written copy of an appeal resolved by the Board will be “served upon all parties.”<sup>127</sup> Do these provisions for private reporting of decisions implicitly forego all “public reporting of decisions”? It is difficult to say. With no comments on this apparent omission, an ambiguous provision that is not unambiguously required will not compel the Commission to identify an inconsistency and disapprove the Enforcement proposed rule. Nevertheless, the Authority can and should provide explicit guidelines for confidentiality and public reporting of decisions. These are not trivial issues: Public reporting of decisions is a crucial way to develop the law and inform regulated parties and the public at large about how the Authority’s rules will be applied in practice. So, too, confidentiality policies can preserve important privacy interests, especially before a violation is alleged or found. A careful balance between confidentiality and transparency is important to find. Accordingly, the Commission directs the Authority to file with the Commission by July 1, 2022 a supplemental proposed rule modification explicitly stating guidelines for confidentiality and public reporting at the different stages of the processes outlined in the Enforcement rule. The Commission will then publish the proposed rule modification for public comment before approving or disapproving it under 15

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<sup>126</sup> *Id.*

<sup>127</sup> Notice, 87 Fed. Reg. at 4,030.

U.S.C. § 3053.

**d. Rule 8400—Investigatory Powers**

Proposed Rule 8400 specifies that the Commission and the Authority (and their designees) have the right to access the files and facilities of Covered Persons and those who own or perform services on a Covered Horse as well as the right to seize evidence of suspected violations.<sup>128</sup> It requires Covered Persons to respond truthfully and cooperate with the Commission and the Authority and forbids hindering an investigation.<sup>129</sup> It further specifies that the Commission or the Authority may issue subpoenas, which must be complied with, for both things and people, who may be required to testify under oath.

Proposed Rule 8400 implements a different provision of the Act than the rest of the Enforcement proposed rule: 15 U.S.C. § 3054(h) specifies that the “Authority shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.” More specifically, § 3054(c)(1)(A) requires the Authority to propose “uniform procedures and rules authorizing—(i) access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses; (ii) issuance and enforcement of subpoenas and subpoenas duces tecum; and (iii) other investigatory powers of the nature and scope exercised by State racing commissions before the program effective date.” With respect to proposed Rule 8400, § 3054(c)(1)(A) and (h) principally provides the “the specific requirements, factors, standards, or considerations in the text of the Act” with which the Commission assesses the proposed rule’s consistency.<sup>130</sup>

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<sup>128</sup> See *id.* at 4,031.

<sup>129</sup> See *id.*

<sup>130</sup> Notice, 87 Fed. Reg. at 4,027.

Eight of the comments expressly addressed proposed Rule 8400. The Florida Horsemen stated: “It is unconstitutional to grant the Commission, Authority, or designee unfettered access to the books, records, offices, facilities, and other places of business for any person who owns a Covered Horse.”<sup>131</sup> The Florida Horsemen recommended that the right of access be eliminated as to owners of Covered Horses, with only subpoena power available for the files and facilities of owners. The Thoroughbred Horsemen agreed with the Florida Horsemen: “ ‘Investigatory authority’ does not imply the ability to ‘freely access’ the place of business of any person who owns a Covered Horse or performs service on a Covered Horse, apparently for any purpose.”<sup>132</sup> Their proposal would go further, stripping the access power down to just “racetrack facilities, barn areas, and vehicles under control” of owners and service providers.<sup>133</sup> Remington Park raised the concern that the access power has “no limitation or cause requirement before officers or designees of the Commission or the Authority can enter onto the premises of Covered Persons and apparently review and take information at will.”<sup>134</sup> Its preference was “to institute parameters around information requests and timing of on-site review.”<sup>135</sup>

Five state racing regulators also commented on proposed Rule 8400. “These seizures are permitted outside the constitutional limits of the 4<sup>th</sup> Amendment and one’s reasonable expectation to privacy,” opined the Texas Commission.<sup>136</sup> The Pennsylvania Commission contended that the proposed access rights are “overly broad” and do “not appear to be statutorily permissible.”<sup>137</sup> It also asked whether access rights apply “to every location in which a covered

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<sup>131</sup> Fla. Horsemen at 2.

<sup>132</sup> Thoroughbred Horsemen at 5 (emphasis omitted).

<sup>133</sup> *Id.*

<sup>134</sup> Remington Park at 3.

<sup>135</sup> *Id.*

<sup>136</sup> Tex. Comm’n at 5.

<sup>137</sup> Pa. Comm’n at 3.

person transacts business (personal home, farm, etc.)? What type of warrant will be used?”<sup>138</sup>

The Oklahoma Commission contended that the powers of proposed Rule 8400 “far exceed[] any regulatory authority [it] has per Oklahoma statute,” which “is limited to the enclosure of licensed racetracks and to licensed individuals or entities.”<sup>139</sup> The Minnesota Commission agreed: It “is limited in our jurisdiction to only premises licensed by the Minnesota Racing Commission, and this would be a vast expansion of that jurisdiction that would conflict with current Minnesota statutes and rules.”<sup>140</sup> Finally, the Kentucky Commission not only agreed that proposed Rule 8400(a)(1)’s access powers “appears to be an overreach” but also offered specific feedback to other provisions. First, the Kentucky Commission sought clarification on the meaning of “device” in proposed Rule 8400(a)(2)’s seizure powers and the related terms “device,” “equipment,” and “instrumentalities” in proposed Rule 8400(d).<sup>141</sup> Second, it suggested that the cross-reference in proposed Rule 8400(e) “is an example of the [Kentucky Commission’s] overall concern that the Authority’s regulations are disjointed and require a reader to look in several locations to ascertain what conduct is prohibited and the penalties for same.”<sup>142</sup>

The Authority disagreed that its proposal was unconstitutional and responded to commenters’ concerns, noting: “These comments and proposals have been carefully reviewed, and the Authority will give consideration to modifying or supplementing certain provisions in Rule 8400 in future . . . rulemaking.”<sup>143</sup> It separately addressed the Kentucky Commission’s suggestion with respect to further defining “devices” and “instrumentalities” to specify, for example, goading instruments, shock wave machines, and transcutaneous carbon dioxide—

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<sup>138</sup> *Id.*

<sup>139</sup> Okla. Comm’n at 3.

<sup>140</sup> Minn Comm’n at 2.

<sup>141</sup> Ky. Comm’n at 2.

<sup>142</sup> *Id.* at 3.

<sup>143</sup> Authority’s Response at 16.



measuring devices: “The suggested revision has been noted will be considered in future modification of the rules.”<sup>144</sup>

The Commission finds that proposed Rule 8400 is consistent with the Act. Some commenters expressed grave concern with the breadth of the access rights provided by proposed Rule 8400(a)(1), but the language of the proposed rule closely mirrors the language of the Act. Notably, the limitation in the Act that investigatory powers be “of the nature and scope exercised by State racing commissions before the program effective date” applies only to the catchall “other investigatory powers” of § 3054(c)(1)(A)(iii) and not to the access power or subpoena power provided by § 3054(c)(1)(A)(i) and (ii). Accordingly, the state agencies that argued that the proposed Rule 8400(a)(1) access rights are broader than corresponding state laws have identified a policy difference but not an inconsistency with the Act.

The principal distinction between the Enforcement proposed rule’s language on access rights and the text of the Act is that the latter provides for “access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses” whereas proposed Rule 8400(a)(1) reiterates the Act’s language and then further specifies that access applies also “to the books, records, offices, facilities, and other places of business of any person who owns a Covered Horse or performs services on a Covered Horse.”<sup>145</sup> These descriptions differ in detail but not substance—the Authority’s elongated provision includes two additional categories of people, “any person who owns a Covered Horse or performs services on a Covered Horse,” beyond the

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<sup>144</sup> *Id.*

<sup>145</sup> *Compare* Notice, 87 Fed. Reg. at 4,027 (“access to the books, records, offices, racetrack facilities, and other places of business of Covered Persons that are used in the care, treatment, training, and racing of Covered Horses, and to the books, records, offices, facilities, and other places of business of any person who owns a Covered Horse or performs services on a Covered Horse”), with 15 U.S.C. § 3054(c)(1)(A)(i) (“access to offices, racetrack facilities, other places of business, books, records, and personal property of covered persons that are used in the care, treatment, training, and racing of covered horses”).

Act’s “covered persons,” but owners of and service-providers for covered horses *are* covered persons under the Act.<sup>146</sup> The objections to proposed Rule 8400(a)(1), in other words, are really objections to § 3054(c)(1)(A)(i), and they do not identify any way in which the proposed rule provisions are inconsistent with the Act.

The seizure power of proposed Rule 8400(a)(2), by contrast, is not provided for expressly in the Act, but it falls comfortably within the “other investigatory powers of the nature and scope exercised by” the state agencies.<sup>147</sup> 15 U.S.C. § 3054(c)(1)(A)(iii). Notably, while many commenters identified proposed Rule 8400(a)(1)’s access power as exceeding their state investigatory powers, none did so for the seizure power of proposed Rule 8400(a)(2). Similarly, no commenter attempted to argue that proposed Rule 8400(e) and (f)’s subpoena and enforcement provisions were inconsistent with the Act’s requirement of a provision authorizing “issuance and enforcement of subpoenas and subpoenas duces tecum.” *Id.* § 3054(c)(1)(A)(ii).

Although the Commission finds that the seizure power of proposed Rule 8400(a)(2) is consistent with the Act’s text, the Commission is concerned that the seizure power, without further development from a future proposed rule modification, could be used in an unanticipated manner that could offend the due process required by § 3057(c)(3). Accordingly, the Commission directs the Authority to submit to the Commission a supplemental proposed rule

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<sup>146</sup> See 15 U.S.C. § 3051(6) (“The term ‘covered persons’ means all . . . owners, . . . veterinarians, . . . and other horse support personnel who are engaged in the care, training, or racing of covered horses.”). *N.B.*, to the extent that the services provided in fact go beyond “the care, training, or racing of covered horses,” those who provide such services would not be subject to the proposed Rule 8400(a)(1)’s access rights. For example, a photographer who places flowers in a horse’s mane before a photo shoot theoretically performs services on a Covered Horse but not services that concern the care, training, or racing of covered horses. It also bears repeating that the Authority’s “subpoena and investigatory authority” exists only with respect to investigating “civil violations committed under its jurisdiction.” *Id.* § 3054(h). Accordingly, the Authority cannot inspect the books of the owner of a covered horse or a veterinarian to uncover, for example, violations of the securities or tax laws, and the Act makes this clear.

<sup>147</sup> See, e.g., Minn. Stat. § 609.762, subdivision 1 (“The following are subject to forfeiture: . . . property used or intended to be used to illegally influence the outcome of a horse race.”) & *id.*, subdivision 2 (“Property subject to forfeiture under subdivision 1 may be seized . . . without process” in many circumstances).

modification by July 1, 2022, in which the Authority further defines the meaning of “object” and “device” within proposed Rule 8400(a)(2)’s list of items eligible for seizure (“medication, drug, substance, paraphernalia, object, or device”) and that provides a process for the return of seized property if no violation is found.<sup>148</sup> The Commission believes that the Authority intended “object” and “device” to be read under the principle of *ejusdem generis*, such that “object” and “device” are understood to be of a similar nature to “medication, drug, substance, [and] paraphernalia.” Because both “object” and “device” are capacious words, however, a qualification would materially improve the clarity of the seizure power under the rule.<sup>149</sup> Such a qualification in a proposed rule modification could clarify, for example, that “object” and “device” do not include telephones, computers, or other repositories of electronic data, which are more suitable for production under a subpoena duces tecum because they are not objects or devices that are themselves evidence of a possible violation.

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For the preceding reasons, the Commission finds that the Horseracing Integrity and Safety Authority’s proposed rule on Enforcement is consistent with the Horseracing Integrity and Safety Act of 2020 and the Commission’s procedural rule governing submissions by the Authority. Accordingly, the Enforcement rule is APPROVED. The Commission directs the Authority (1) to not impose the proposed sanction in Rule 8200(b)(6) on a covered person until such time as the Authority has proposed, and the Commission has approved, a rule modification that is more narrowly tailored; (2) to file with the Commission, by July 1, 2022, a supplemental proposed rule modification explicitly stating guidelines for confidentiality and public reporting at

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<sup>148</sup> Notice, 87 Fed. Reg. at 4,031.

<sup>149</sup> *Cf. Yates v. United States*, 574 U.S. 528, 545 (2015) (applying *ejusdem generis* in deciding that the Sarbanes-Oxley Act’s prohibition on the destruction of “tangible objects” did not extend to the destruction of fish).

the different stages of the processes outlined in the Enforcement rule; and (3) to file with the Commission, by July 1, 2022, a supplemental proposed rule modification in which the Authority further defines the meaning of “object” and “device” within proposed Rule 8400(a)(2)’s list of items eligible for seizure and provides a process for the return of seized property if no violation is found.

By the Commission.

April J. Tabor  
Secretary