U S T A

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February 8, 2023

The Honorable Lina M. Khan, Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: HISA Anti-Doping and Medication Control Rule
Docket Number: FTC-2023-0009

Dear Chairwoman Khan:

The United States Trotting Association ("USTA") respectfully requests that the Commission disapprove the Anti-Doping and Medication Control Rule (the "Rule") proposed by the Horseracing Integrity and Safety Authority (the "Authority").

The USTA is a national, 17,000-member, not-for-profit association of Standardbred horse owners, breeders, drivers, trainers, and officials headquartered in Columbus, Ohio. It creates the rules of harness racing, licenses persons involved in harness racing, serves as the registry for Standardbred horses, works to ensure the integrity of harness racing, and ensures the humane treatment of Standardbred horses. Before state racing commissions began to regulate harness racing in the 1960s, the USTA was the sole regulatory body for harness racing. In order for a Standardbred horse to be eligible to race in North America, that horse must be registered with the USTA. And for a driver or trainer to qualify for a license from the state racing commission, he must first pass written and practical examinations administered by the USTA.

As you know, the USTA is presently a party in litigation against the Authority and the FTC in a case in the U.S. Court of Appeals for the Sixth Circuit, styled *State of Oklahoma et al. v. United States of America et al.,* No. 22-5487. We believe that the Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051-60 ("HISA" or the "Act"), is unconstitutional because it violates the nondelegation doctrine and the anticommandeering doctrine. The U.S. Court of Appeals for the Fifth Circuit agreed with our position regarding the nondelegation doctrine. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869 (5th Cir. 2022). Therefore, the USTA strongly believes that all actions taken in pursuit of implementing the Act, including the development of a regulatory regimen and this comment period, are unlawful.

However, despite the Fifth Circuit ruling and ongoing litigation in the Sixth Circuit, the FTC chose to publish the Rule for public comment. Therefore, not wishing to waive our opportunity to comment on rules that purport to one-day govern our industry, the USTA submits the following comments without prejudice to our position in the ongoing litigation.

Not only do we believe the originally passed version of HISA was unconstitutional, but we also vigorously assert that the recent tweak to HISA, Consolidated Appropriations Act, 2023, div. O, tit. VII, § 701 (2022) (the "Amendment"), does not solve its constitutionality problems. As you know, on January 12, 2023, we filed a Supplemental Brief with the Sixth Circuit, in which we explained the recent back-end modification power given to the FTC does not allow it to control the content of federal law; the amended Act still delegates to a private corporation the exclusive power to enforce the Act in federal court and the power to expand its own jurisdiction; and the Amendment makes no attempt to solve the violation of the anticommandeering doctrine.

While the court has yet to rule on the Amendment, Members of Congress, many of whom objected to the Amendment, agree with our position. Rep. Lance Gooden recently explained his opposition to the Amendment in the Congressional Record:

> The so-called "fix" still did not allow the FTC to make policy decisions. The FTC still may only reject rules proposed by the Authority if they are inconsistent with the Act, but the Act is written so broadly that no rule will ever be rejected. After the rules have gone into effect, the FTC may now issue its own rules, but it still may do so only to make them consistent with the Act. It cannot impose its own policy decisions on the Authority's rules.[1]

Finally, when presented with a request by the Authority to vacate its decision in light of the Amendment and a request by the FTC to rehear the case based on the Amendment, the Fifth Circuit declined to do so.

For all these reasons, the USTA remains steadfast in our position that HISA remains unconstitutional even with the Amendment. Based on that fact alone, the FTC should disapprove the Rule. At the very least, the FTC should repeat its December 12, 2022, comments on the Rule, in which you stated that you would disapprove the Rule until "the legal uncertainty regarding the Act's constitutionality comes to be resolved."[2] It is far from resolved. The legal uncertainty is more evident now than ever, and the FTC must continue to disapprove the Rule.

Additionally, because these Rules may be applied to Standardbred horses in the future, the Commission should not approve any regulations that do not consider the different performance models of Standardbreds and Thoroughbreds. A one-size-fits-all approach will not work, and simply duplicating Thoroughbred regulations down the road would not be an acceptable approach for governing the Standardbred racing industry.

Standardbred racing differs radically from Thoroughbred racing with respect to biomechanics and the racing performance model. It would be arbitrary and capricious to apply medication regulations designed for Thoroughbreds to Standardbreds. Standardbreds race on the trot or pace, and these gaits distribute the horse's weight at a slower rate over two legs at a time. Thoroughbreds, by contrast,

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[1] Congressional Record, Vol. 169, No. 15 (Extensions of Remarks - January 24, 2023) *Opposing the Unconstitutional Horseracing Integrity and Safety Authority*, https://www.congress.gov/congressional-record/volume-169/issue-15/extensions-of-remarks-section/article/E47-4?q=%7B%22search%22%3A%5B%22%22%5D%7D&s=3&r=1.

[2] Fed. Trade Comm'n, *Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority*, Dec. 12, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_hisa_anti-doping_disapprove_without_prejudice_0.pdf.

race on the gallop, which is the fastest a horse can go and involves repeatedly striking the ground on one leg with the horse's entire 1,000-pound weight. Standardbreds are also sturdier and more robust than their Thoroughbred counterparts; therefore, they can race more frequently. Simply put, larger horses sometimes require larger doses of medication, and horses that race more often sometimes require doses of medication more often. Both these factors cause Standardbred racing medication standards to differentiate themselves from those of Thoroughbreds. The Harness Racing Medication Collaborative (HRMC) has decades of research and experience weighing in on Standardbreds, and their expertise should be given significant weight and respect when developing rules for our industry. Currently, the proposed Rules make no mention of utilizing the HRMC.

Accordingly, the Commission should not approve the Rule, which under the Act could likely be applied to the Standardbred breed in the future, without taking into account the differences between the breeds and their performance models. If these Thoroughbred regulations are forced upon our Standardbred horsemen, it will harm our industry and put our horses and drivers at risk. Congress found this to be important, too, as the Act specifically states that the Authority "shall take into account the unique characteristics of each breed of horse." It has unequivocally failed to do so.

Furthermore, the Rule's proposed change in the regulation of therapeutic medications from recommended withdrawal times to detection times will cause uncertainty for all three breeds of racing horses. Recommended withdrawal times are based on extensive scientific research and have been used in the industry for decades to provide certainty as to when veterinarians and trainers may administer therapeutic medications prior to races and timed workouts. By contrast, detection times assess the first time after administration that a drug is below the set threshold. The research on which they rely is not peer reviewed, is sometimes based on a very small sample size, and is often unable to be replicated. For this reason, detection times are unreliable. Detection times are also unusable to the trainers and veterinarians who are charged with the custody and care of horses. Veterinarians will do their best to use the detection time to calculate a withdrawal time that balances the need to use therapeutic medication to keep their horses healthy versus the risk they are willing to accept of failing the test. But rather than introducing this unnecessary level of uncertainty into the industry, it would be best for the FTC to establish a standard withdrawal time for all to use. The Racing Committee Chair of the American Association of Equine Practitioners (AAEP), a national equine veterinary leader, recognized this problem with the proposed Rule and warned practitioners to comment on the harm it will cause to the industry. We echo her concern.

In conclusion, the USTA respectfully requests that the Commission disapprove the Authority's proposed Rule. The Act has been ruled unconstitutional. Legal uncertainty remains regarding the recent Amendment. And the Rule takes no account of the important differences among the breeds of horses that it could potentially regulate. Please do not hesitate to reach out if you would like to discuss any of these points in more detail.

Sincerely,

Mike Tanner

Mike Tanner, CEO