

Q&A

Why RHSA? Why have another federal law?

What happens when the Supreme Court agrees with us that HISA is illegal and they strike it down? Do we want to go back to thirty-plus states regulating racing, each one a separate jurisdiction? No. We don't want to, and it isn't possible anyway. The HISA supporters have shamelessly misrepresented the way things were before, saying that the state racing commissions were incompetent, doping was rampant, and the rest of us tolerated it and now want to return to those days. But in struggling against this misleading propaganda we've learned at least one important lesson: working effectively together, the states are the ideal racing regulator.

HISA's own behavior proves this. Why else has the HISA Authority so frantically, and at great expense, worked to infiltrate and occupy the state system? Because Congress didn't give HISA a system of its own. It's as if Congress made the HISA Authority a police force but forgot to give them their own police cars. If you were sitting at a traffic light and a police officer climbed in and said, "Follow that car!" you'd probably comply. Likewise, Congress sent this unfunded, private entity to climb into the states' regulatory structures and govern in their place, partly by regulating and manipulating the states. If the state system was so bad, why is the HISA Authority so desperate to capture and use it?

Some may not agree that the main purpose of HISA was to capture the state regulatory system. To the extent that the HISA Authority has brought any value to the table, if the HISA statute is invalidated that value becomes the property of the Thoroughbred industry, which has already paid dearly for it.

RHSA is the law that Congress would've enacted without the machinations of elite special interests. It will coordinate state knowledge and resources like never before to guarantee equine health and safety and industry integrity.

But HISA came about partly because the state commissions were seen as ineffective.

Any claim that the state commissions are incompetent is propaganda intended to distract from HISA's efforts to grab state resources. Now if the claim was that the state commissions could do better, I'd agree. But the answer can't be to bring in a private club adorned with federal governmental authority that it can't legally have. The smart response is to figure out how the state commissions could be made to do better. Two ways are obvious right off the bat.

One way is funding. State commissions are chronically underfunded, which limits their effectiveness. Some costs of regulation must be paid by state or federal governments. For instance, if you had the regulated parties directly paying the salaries of the regulatory employees, there would be a danger that the regulators would eventually answer to certain powerful regulated parties rather than the legislative and executive branches of government. It's easy to see how the HISA Authority could be influenced by certain powerful factions, such as the powerful faction that created it. The danger of influence is why state legislatures appropriate funds for the commissions and state executives appoint the commissioners. It makes sense for the industry to pay some costs of regulation, like for scientific research, but the regulatory process must be adequately funded and the regulators must be subject to effective governmental oversight. State commissions should be a higher priority in the state appropriations process.

Another way for state commissions to be more effective would be to give them an environment of active compliance instead of a code of silence. Horsepersons have allowed cheaters and abusers to operate freely in their midst, leaving it entirely up to the state commissions to do something about it. Wrongdoers are few, but they get all the publicity. How many appalling abuses must get published in the national media, with accompanying inflammatory rhetoric from PETA, before the horse racing industry wakes up to the fact that we could get put out of business? Do we really love our horses or not? Wrongdoers should be vigorously blocked and shunned by the industry and their activities should be reported to the authorities. It's unpleasant to be called a rat, but middle school rules don't apply when crooks are turning the public against us and taking food out of our children's mouths. This isn't middle school. It is our livelihood.

What makes RHSA different from HISA?

RHSA is administered by the states, which have traditionally regulated horse racing medication and safety with no federal involvement. HISA, on the other hand, is not really federal. It usurps the states' authority but raises up a private club, the "HISA Authority," in their place. The members of the HISA club are neither appointed nor removable by any public official. HISA cooks up its own budget without industry input, then sends the states the bill, expecting them to collect from the industry. Its deliberations and decisions take place behind closed doors. The HISA "Authority" might as well be a department of The Jockey Club.

The difference is stark: state commissioners are appointed and removable by elected officials, their budgets are public, and their meetings are public. The difference boils down to accountability: HISA and its minions are accountable to no legitimate governmental authority and certainly to no one in the horse industry except perhaps the elite that contrived it.

Another glaring difference is that the horse industry wants RHSA and does not want HISA. For example, the National HBPA, which has over 30,000 members, and the USTA, which has over 19,000 members, have fought HISA since it first appeared. By comparison, the most influential racing group supporting HISA is The Jockey Club, which has 168 members, plus a number of people who wish they could be Jockey Club members. HISA was forced on us by a tiny but wealthy and politically connected sliver at the top of the Thoroughbred elite.

The federal government, not the states, has authority over interstate data transmission. RHSA openly uses Congress's control over interstate simulcasting to make sure that the states combine their resources and coordinate their efforts to protect equine welfare and industry integrity. RHSA will improve equine welfare because the statutory purpose – from Congress – is decision making based on science. By contrast, the HISA statute has no delineated purpose. Instead, as section 3055 of the HISA statute demonstrates, the HISA Authority generates optics-based policy that does not work. Tragically, after HISA had been fully implemented for Thoroughbreds last May, twelve horses died in six weeks at Churchill Downs Racetrack, which was forced to move racing to another track. After an expensive and lengthy study, the HISA Authority failed to determine that cause of the problem.

This is a case where there is a stark difference between stated goals and actual goals. RHSA and HISA both claim the goals of equine welfare and industry integrity. Beyond that they part company. HISA intends to capture the established state regulatory process and hand it over to a private club. RHSA will follow the proven path of empowering the states.

You said that HISA is not really federal and not accountable to legitimate governmental authority. How is that possible when HISA is an Act of Congress and gives oversight to the Federal Trade Commission – the FTC?

First, HISA was not an Act of Congress, it was an act of Mitch McConnell. HISA's predecessor legislation failed in Congress session after session, for the better part of a decade. Even Churchill Downs, America's iconic racetrack, refused to support it. But when the legislation was changed to a version that Churchill liked, Senate Majority Leader McConnell tucked the bill into the nether regions of 2020's 4,000-page omnibus appropriation measure, which had to pass to keep the government running. Remember, Churchill is in Louisville and Louisville is McConnell's hometown.

Funnily enough, when a federal circuit court of appeals struck HISA down as unconstitutional, the HISA elite had cobbled together some legal duct tape to hold their failed law together, so they got McConnell to slip an attempted fix into 2022's 4,000-page omnibus measure, yet another must-pass appropriation bill. Evidently when you're among

the elite you can pass legislation by omnibus and amend it by omnibus. The elite got McConnell to throw our livelihood under the omnibus and we aren't going to stand for it.

Second, the FTC is in the HISA statute only as a garnish, not to exercise any meaningful Executive Branch oversight. The HISA Authority sets policy, not the FTC. The HISA Authority doesn't recommend medication and safety rules, it writes them. The HISA Authority creates its own budget. The HISA Authority goes to federal court to enforce its orders. Amazingly, the HISA Authority unilaterally switched off one state's export simulcast signal, an irresponsible action that economically terrorized industry members in other states, inducing them to advocate for cooperation with HISA. Meanwhile, the FTC just sits by and approves everything, as it must do the way the HISA statute is written. In fact, the FTC has repeatedly stated that it lacks power to do anything significant about the HISA Authority's activities.

Third, HISA is Inside Baseball and RHSA is the opposite. HISA was drafted by The Jockey Club and its elite friends. RHSA was originally drafted by the racetrack veterinarians, who know more than anyone else about the health and welfare of racehorses. The National HBPA did extensive work on it, as did the USTA. The bill's original sponsor ran it through their Congressional Legislative Services office a couple of times before introducing it. The bill is out there in the daylight where it can be reviewed and amended in the normal legislative process. Opponents can raise any objections they can think of, and they are welcome to do so. RHSA is getting the public and legislative input that HISA never had.

Now RHSA has been introduced in Congress and is gaining sponsors. What are the important structural differences between RHSA and HISA?

Here is the structure in a nutshell. The RHSA bill repeals HISA and restores state authority by authorizing an interstate compact under the U.S. Constitution's Compact Clause. Congress must approve all interstate compacts. Congress establishes the ground rules in the RHSA statute: equine welfare and industry integrity. The states then actualize these legislative purposes by creating a uniform set of bylaws to ensure accountability and a set of consistent regulations. As I said, only states cooperating in the RHSA compact can export their simulcast signal, an incentive that will ensure state cooperation and coordination of resources.

Wait -- an interstate compact? Critics are saying that has never worked in horse racing.

I heard that certain lobbyists have been floating this notion in legislative offices. They'd better be careful not to get caught in a fib. One of the most successful interstate compacts of all time is the National Racing Compact, which already handles the bedrock regulatory function of licensing for the Thoroughbred and Standardbred breeds in practically all the racing states. Licensing is the essential tool in racing regulation. The states participating in the National Racing Compact are doing so voluntarily. And, unlike HISA, the National Racing Compact is well liked within the horse industry.

To be fair, some of us in harness racing resisted interstate compacts in the past because we were afraid of losing our autonomy. Now an elite special interest has arisen in the guise of HISA and eliminated the autonomy of the states along with our own. The lessons learned are clear ones: quality regulation is essential to an industry's success, without regulator accountability there can be no quality, and there is no accountability at HISA. An interstate compact is the only way.

Other structural differences?

RHSA mandates separate rules for separate breeds by structuring three separate medication committees in the statute, one for each racing breed. Therapeutic medication in horse racing is just a type of sports medicine. Athletes in football, baseball, and basketball experience different physical stresses and each sport requires a different medication regime. The racing performance models of each equine breed are also different and the needs of each should be addressed by a committee that is specifically qualified to do so. By mandating separate, breed-specific medication committees, RHSA will ensure that appropriate, science-based rules will be adopted at long last.

Who will sit on these committees?

Each medication committee consists of three members appointed by the RHSA Board and four members appointed by industry groups, with the members serving staggered, three-year terms. The same individual may serve on two committees at most.

The RHSA's nine-member Board is appointed by the state racing commissions participating in the compact. The five states with the most racing days appoint five board members and the remaining states appoint four. The Board will have final say on all rules proposed by the committees, but all decisions must be supported by the available scientific evidence, not merely the opinions of a few hand-picked committee members. Unlike HISA, all meetings, budgets, and official correspondence will be open to the public.

Why did you think it was necessary to replace HISA?

HISA's yoke shouldn't have been forced on any of us in the first place!

HISA has one of the most deplorable pedigrees of any law in the United States Code. It never had a minute of floor debate. It had one or two subcommittee hearings that were absurdly stacked. We tried to get on the witness list and were ignored. HISA failed in Congress session after session, year after year, until a uniquely powerful Senate Majority Leader from Kentucky did an end run around the Congressional regular order. Now we've got this disastrous, pseudo-federal program.

“Disastrous”? Why?

First, HISA's proponents have never yet answered the question why HISA would work better than state regulation. They've articulated nothing. The best they could do was to say, “It's federal!” It didn't require a crystal ball to know there were going to be serious problems. Now we're seeing them.

Second, HISA has been imposed on the Thoroughbred sport and it will be imposed on the Standardbred sport soon enough if we don't stop it. But the many Thoroughbred breakdowns that aroused the sympathies of us all have diminished. They continue unabated, with horses dying on the track even on Derby Day and Travers Day, when the world is watching and racing should be at its best. This carnage continues unabated on HISA's watch.

Third, HISA is incompetent. Many horses and horsepersons remain unregistered. Many rules had to be walked back after being issued. The medication control program was delayed, then delayed again. When it was finally introduced, it generated a rash of environmental positives for therapeutic medication. This tarnished the reputations and emptied the wallets of trainers and others forced to fight through HISA's draconian, guilty-until-proven innocent maze. HISA has already started putting small stables out of business for things like trace amounts of diabetes medication also detectable in the municipal water supply, and this will get worse. Isn't it obvious that HISA's inept bumbling occurred partly because HISA completely lacks the knowledge and capabilities of the state racing commissions, based on science and developed over more than half a century of experience?

Fourth, HISA was loudly touted as an anti-doping miracle. Yet, according to the Association of Racing Commissioners International, HISA's testing labs have not found any drugs that had not already been found by the state commissions. All HISA seems to be able to do is restrict the use of therapeutic medication and ruin small stables for things like

diabetes medication that many of us imbibe every day in the municipal drinking water. Isn't it just possible that HISA's obsession with optics and public relations has prevented it from making any progress? To help answer this question, have a look at HISA's eighty-million-dollar budget for 2024. How much is being spent on scientific research? And don't count that bogus furosemide study, which is a model for arbitrary and capricious regulation.

One other thing. The television viewing public was recently subjected to a *60 Minutes* segment that seemed to have no purpose other than to show Thoroughbreds snapping their legs and dying on the track. That will be all that viewers remember about it. Who in their right mind would initiate such a thing? Certainly, HISA won't help this situation by withholding therapeutic medications from the horses that need them, and putting stables out of business for environmental positives. In fact, excessive restriction of therapeutic medication might actually increase the breakdown rate. Meanwhile, small Thoroughbred stables are being wiped out and their harness counterparts will follow soon enough. The industry serving those stables will be wiped out as well. Remember, if the economic engine that is the horse racing industry collapses, the elite that brought us HISA will still race for silver cups and hardly notice the difference.

Racing is their hobby, but it's our livelihood.

How will RHSA cost less to administer than HISA?

The state commissions are not going away – they still have their own budgets in addition to HISA's nearly nine-figure cost. RHSA requires the state commissions to coordinate their existing infrastructure and resources, which will bring cost efficiencies. Any additional money should be spent to amplify and support the states, such as by providing federal enforcement powers. But this will amount to only a fraction of the money HISA is already wasting with its secretly contrived and gigantic budget. Out of the blue, HISA assessed the Thoroughbred breed \$66 million in 2023 and \$78 million in 2024. By contrast, the RHSA budget will be worked out in the daylight with input from those affected, which will be a determinative improvement over HISA.

HISA receives no public money, making it easy for the HISA Authority to escape accountability for its budget and the activities it funds. The RHSA budget will be partly state funded because certain regulatory functions require accountability. Public funding will reduce the amount that HISA is requiring industry participants to pay.

Your side doesn't seem to be racking up many wins in the HISA litigation. Do you have a comment?

Look at the *Murphy* case, which brought sports betting to the Meadowlands, among other things. *Murphy* presented an anticommandeering issue just as ours does. The challengers to the restrictive federal statute lost in the district court, lost in the circuit court, filed in the Supreme Court but got remanded back to the district court, lost there, lost again in the circuit court, and then won it all in the Supreme Court. This is not unusual in legal situations where the lower courts are in philosophical disarray and the Supreme Court must provide guidance. In other words, our case was always aimed at the Supreme Court.

We present two constitutional questions that cry out for Supreme Court guidance. One is whether in this monstrosity of a HISA statute Congress has unconstitutionally delegated governmental authority to a private entity. The Supreme Court has not ruled on that question in more than 80 years. The other is whether Congress can constitutionally permit a private club to cook up its own regulatory program, require Executive Branch enforcement, appropriate no money to pay for it, and leave the states to either pay the bill or hand over their governmental resources to private control. We know from existing rulings that there are justices who would probably rule our way on one or both questions. In fact, three justices have explicitly asked for a case like ours. Moreover, the Fifth Circuit did strike HISA down, and now we're waiting to find out whether the same court thinks that Senator McConnell's attempted-fix-by-omnibus solved the problem. The horse racing industry is presently on the threshold of the Supreme Court, offering the Court an excellent opportunity to eradicate legislative overreach like HISA.

You've talked about "science vs. optics." What does that mean?

This controversy has been raging in the horse racing industry for over a decade. The state racing commissions always took the approach that horses could get the benefits of therapeutic medication without performance enhancing effects if administration guidelines could be calibrated scientifically, combined with advanced testing capabilities. The Racing Medication and Testing Consortium, a private organization that has great influence at the Association of Racing Commissioners International, takes a different approach, one that adopts the most restrictive conceivable approach to therapeutic medication regardless of scientific data. HISA embraces this latter notion.

Science is based on verifiable truths that multiple people can agree on. Optics, how something is supposed to be perceived by others, is a matter of opinion and, as we know, everyone has their opinion. Opinions need not be supported by verifiable truths.

Furosemide is the clearest example of this controversy. Veterinarians and many others in racing recommend the use of furosemide to minimize exercise-induced pulmonary hemorrhage, known as EIPH. Equines are uniquely susceptible to EIPH and

furosemide is the only medication known to help it. However, furosemide must be administered close to the time of a race, because it clears quickly from the horse's system. This means that a horse that -- a veterinarian determines -- needs furosemide must get a shot shortly before the race. But a few members of the racing elite thought this was bad optics: they imagined that the public would not approve. Based on their psychic reading of the public mind, they now assert that this means that furosemide should be banned, at least on race day.

The HISA statute blatantly elevates opinion over science in the furosemide "study" language appearing in Section 3055. This deplorable optics exercise sets the stage for all kinds of arbitrary policies and decisions from the HISA Authority that we can expect in the future.

Optics, the arbitrary calculation of what looks good, makes accountability impossible because optics always leads back to someone's opinion. Science is based on unbiased observation and conclusions that can be replicated in every situation presenting the same conditions. This is accountability in its essence. Regulated industries have the right to demand accountability from their regulators. RHSA will provide accountability. HISA can never do so.

Does the RHSA have any chance of being passed?

Yes.

If we win in court, HISA will be struck down and will cease to have legal effect. That will make straight the way for RHSA to take HISA's place.

I admit that we don't have the elite influence to get RHSA enacted by Magic Omnibus in the middle of the night. On the other hand, RHSA will receive the debate and discussion that HISA never got. Meanwhile, more than a few former HISA supporters, both in Congress and in the public arena, are getting interested in RHSA as a better way.

Introduction of the RHSA legislation completely changed the narrative within horse racing. No longer do we have only one side parroting its propaganda, like "We need uniformity in regulation" and "Anyone opposing HISA wants to keep the status quo." Well, RHSA is a far cry from whatever status quo they are imagining. And, as world history teaches, uniformity for the sake of uniformity is too modest a goal at best, and HISA has not even achieved that. RHSA will advance the truly important causes of equine welfare and racing integrity far beyond anything that existed before. In the struggle over HISA, perhaps we are coming to understand ourselves better as an industry. We may find a new appreciation of effective and enlightened regulation that will lead to active compliance and reflect credit on our sport and ourselves. [3/13/2024 5:40 PM]