HORSERACING INTEGRITY AND SAFETY AUTHORITY

Horseracing Integrity and Safety Authority
401 W Main Street, Suite 222
Lexington, Kentucky 40507

July 12, 2022

BY ELECTRONIC MAIL

Re: **HISA Implementation Letter from Senators Grassley, Manchin, Ernst & Kennedy**

Dear Senators,

Thank you for writing and expressing your concerns about the implementation of the Horseracing Integrity and Safety Act ("the Act").

As you know, the Act was signed into law by President Trump in late December 2020 with broad bipartisan support as part of a years-long effort to address the preexisting patchwork system of state-by-state regulations on the twin issues of racetrack safety and thoroughbred doping. This patchwork was so inconsistent that few states running thoroughbred horse races had the same rules on racetrack safety and/or anti-doping and medication control. These seemingly intractable issues led to the tragic death of numerous thoroughbreds and threatened the very existence of the sport and the livelihoods of tens of thousands of individuals across the country. In addition, in early 2020 high profile indictments were issued in connection with the use of performance enhancing drugs on racehorses which also placed the integrity of the sport in further jeopardy.

While it has been an extraordinary challenge to help the FTC establish the first uniform set of racetrack safety and anti-doping rules in our nation's history, the Horseracing Integrity and Safety Authority ("the Authority") is humbled by the role given to us by Congress and by the support we have received from states and stakeholders across the country over the last 18 months.

As set forth in the Act, the Authority submitted to the FTC several rules on a range of issues, including the Racetrack Safety Program. The Racetrack Safety Program was approved by the FTC on March 4, 2022, and became effective on July 1, 2022. The Authority also has made substantial progress on the Anti-Doping and Medication Control (ADMC) Program. After good-faith discussions with the United States Anti-Doping Association (USADA) failed to achieve the hoped-for agreement, the Authority ultimately selected Drug Free Sport International (DFSI) on May 3, 2022 given their extensive experience running anti-doping programs for professional

sports leagues such as the NFL, NBA, MLB, PGA Tour, Nascar and the NCAA. DFSI in turn established the Horseracing Integrity and Welfare Unit (HIWU) to oversee testing, accredit labs, as well as investigate and ultimately initiate enforcement actions. The Authority published updated proposed ADMC rules on June 1, 2022, and have received stakeholder comments which are being reviewed prior to submitting the proposed rules to the FTC for consideration.

We also are pleased to report that after the first eleven days of the operation of the Act's new regulatory regime, 26,136 covered persons and 30, 185 covered horses have registered with the Authority. That number represents the vast majority of those that are required to register under the Act and the rules promulgated thereunder. In addition, the Authority has reached voluntary implementation arrangements with 18 of the 22 states that are conducting covered horseraces for the remainder of this year. In fact, HISA is working cooperatively -- and successfully -- with the state racing commissions in Iowa and West Virginia. By all accounts, the Act has launched smoothly and with the support and compliance of the substantial majority of racing participants. *See* Bob Ehalt and Byron King, '*No Hiccups So Far' as U.S. Racing in Hisa Era Begins*, Bloodhorse, July 2, 2022 (attached) and "*Day 1 of HISA: Scratches Hard to Find, Lone Star Handle Plummets*", TDN, July 2, 2022 (attached).

With that backdrop in mind, please see the Authority's responses to your specific questions:

1. **Why will the Authority not meet the statutory deadline of July 1, 2022 to implement the Anti-Doping and Medication Control Program?**

As you recognize, the Act provides that "the Authority shall establish a horseracing anti-doping and medication control program" through rules promulgated by the FTC "after notice and an opportunity for public comment" "[n]ot later than the program effective date" of July 1, 2022. 15 U.S.C. §§ 3051(14), 3055(a)(1). However, the Act also makes clear that "an agreement with an organization to serve as the anti-doping and medication control enforcement agency must precede the proposal of the ADMC rules because those rules must be established 'in consultation with the anti-doping and medication control enforcement agency.'" Dec. 7, 2021 Letter from Secretary A. Tabor to H. Zeitlin (quoting 50 U.S.C. § 3057(b)(1)); *see also* 50 U.S.C. § 3055(c)(4)(A), (g)(3)(A). Further, the Act provides that the enforcement agency shall, in consultation with the ADMC Standing Committee ("the Standing Committee") of the Authority, develop and recommend AMDC rules, protocols, policies, and guidelines for approval by the Authority. Therefore, without an Agency in place, ADMC rules could not be proposed or promulgated.

Despite the Authority's best efforts and extensive good-faith negotiations, the Authority and USADA (the statute's designated anti-doping default agency) were not able to enter into an agreement on commercially reasonable terms. The Authority's proposal and FTC's subsequent promulgation of anti-doping rules, therefore, would have been a legal nullity because no agreement with an anti-doping and medication control agency was in place before the July 1, 2022 deadline. Consequently, the Authority was required to wait until DFSI was appointed as

the enforcement agency in May 2022 to finalize the draft rules and make them available for public comment.

2. Why did the Authority fail to issue a rule for Anti-Doping Control not later than 120 days before the program effective date as required by HISA?

a. **What statutory authority did the Authority rely on to waive this deadline**?

Please see response to Question 1 above.

In addition, Congress knew that the Authority and the FTC could not guarantee an agreement with an independent third-party anti-doping enforcement agency that had no obligation to enter into the statutorily predicate agreement. That is why the Act preempts state laws only with respect to the matters on which the FTC has promulgated final rules. *See* 15 U.S.C. § 3054(b) ("*The rules of the Authority promulgated in accordance with this chapter* shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority under this chapter[.]") (emphasis added). Unless and until there is a HISA rule on a particular anti-doping/medication-control matter, the States shall continue to regulate that matter. Congress thus prevented any regulatory vacuum in this scenario.

b. **What is the Authority's plan to issue the rule?**

The Authority, through the Standing Committee, has already published the ADMC rules for public comment and that comment period has now closed. Further, the Authority together with the Standing Committee has already met with numerous stakeholder groups and received meaningful, substantive comments. The Authority has even met with and considered input from persons and organizations challenging the constitutionality of the Authority. The Authority and the Standing Committee are now revising the first draft of the rules to integrate the feedback received. The ADMC rules will then be submitted to the FTC for review in the next several weeks. If approved by the FTC, the Authority will implement the new ADMC rules in January 2023.

Critically, even though FTC's ultimate promulgation of the anti-doping regulations will be after the July 1 statutory deadline, "that untimely action [i]s still valid." *Barnhart v Peabody Coal Co.*, 537 U.S. 158-163 (2003) (explaining that Supreme Court has "[n]ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later"). Nothing in the Act suggests that rules promulgated after the statutory deadline should lack force. *See Barnhart*, 537 U.S. at 160 ("[W]e do not readily infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time."); *United States v. James Daniel Good*

Real Property, 510 U.S. 43, 63 (1993) ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."). On the contrary, the Act contemplates that the Authority and FTC will continue to act beyond the statutory deadline to modify the anti-doping and medication-control program. *See, e.g.*, 15 U.S.C. §§ 3053, 3055(e), (f), (g)(3).

3. **Has the Authority requested a waiver of the FTC's requirement that any proposed regulation be submitted at least 90 days before the regulation's proposed effective date? If yes, did the FTC approve the request?**

See October 1, 2021 Letter from H. Zeitlin to Secretary A. Tabor (attached) and November 10, 2021 Letter from Secretary A. Tabor to H. Zeitlin (attached).

4. **Given the Authority has acknowledged the impossibility for industry to comply with the rules regarding horseshoes and riding crop specifications and postponed enforcement of these rules one week before they were set to go into effect, were industry experts and all relevant stakeholders consulted in the initial drafting of these rules? Please identify specifically who was consulted for this rule.**

As an initial matter, and for clarification, all the Racetrack Safety Rules were effective July 1. Yet the Authority made the decision to exercise enforcement discretion to delay sanctions for non-compliance regarding horseshoes and riding crop specifications until August 1, so that all stakeholders had adequate opportunity to secure necessary equipment in time. Due to the global pandemic and other factors, it is well-recognized that nearly every industry has faced supply chain issues; the same has been true for horseracing equipment. *See* April 20, 2022 letter from Farrier Product Distribution to L. Lazarus (attached). The commonsense decision to delay enforcement based on real-world fairness concerns, applied consistently and to aid all horseracing participants, has been well-received by the industry. The Authority simply did what enforcement entities do routinely: exercise sensible enforcement discretion.

As the Act demands, the Racetrack Safety Rules were developed by the Racetrack Safety Committee and then revised following public comment by numerous and diverse stakeholder groups. In an exhaustive process, the Committee consulted (among other sources) existing rules and best practices and sought input from (among other stakeholders) state racing commissions, racing participants, and other experts and industry organizations.

The following lists the Committee's members:

Dr. Susan Stover (Chair): Dr. Stover is a professor of surgical and radiological science at the University of California, Davis and an expert in clinical equine surgery and lameness.

Her research investigates the prevalence, distribution and morphology of equine stress fractures, risk factors and injury prevention, as well as the impact of equine injuries on human welfare.

Dr. Noah Cohen: A University Distinguished Professor and the Patsy Link Chair in Equine Research at Texas A&M University's College of Veterinary Medicine and Biomedical Sciences, Dr. Cohen has dedicated his entire career to equine health and safety, serving as an equine veterinary practitioner before entering academia. Among his many accomplishments, he served on five editorial boards, mentored numerous trainees, and contributed to several hundred scholarly research publications. Dr. Cohen has received numerous national and international awards for his contributions to equine health.

Dr. Lisa Fortier: Dr. Fortier is the James Law Professor of Surgery, Equine Park Faculty Director and associate chair for Graduate Education and Research at the Cornell University College of Veterinary Medicine. Her primary clinical and translational research interests are in equine orthopedic surgery, tendonitis, arthritis and regenerative medicine.

Dr. Peter Hester: Dr. Hester is an orthopedic surgeon specializing in sports medicine and previously worked for equine veterinary surgeon Dr. William Reed at Belmont Park. While in medical school, he was a night watchman at Ballindaggin Farm and has maintained a passion for the sport and rider safety.

Glen Kozak: Mr. Kozak is senior vice president of operations and capital projects for the New York Racing Association's (NYRA) facility and track operations, which include Belmont Park, Saratoga Race Course, Aqueduct Racetrack and others. Prior to joining NYRA, Kozak worked for the Maryland Jockey Club and Suffolk Downs as vice president of facilities and racing surfaces.

Dr. Carl Mattacola: Dr. Mattacola is dean of the University of North Carolina, Greensboro School of Health and Human Sciences. Prior to this, he was associate dean of academic and faculty affairs for the College of Health Sciences at the University of Kentucky. Mattacola's research has focused on neuromuscular, postural and functional considerations in the treatment and rehabilitation of lower extremity injury.

John Velazquez: Mr. Velazquez is one of the most accomplished and respected jockeys in the history of horse racing, having won almost 6,250 races. He is North America's all-time leading money-earning jockey and holds the record for most graded stakes wins. He is a board member of the Permanently Disabled Jockeys' Fund and co-chairman of the Jockeys Guild.

Beginning in September 2021 and throughout the drafting process, the Authority's representatives shared various working drafts of the Racetrack Safety Rules with a number of interested stakeholders for input.

Those interested stakeholders included:

1. American Association of Equine Practitioners;
2. American Veterinary Medical Association;
3. Arapahoe Park;
4. Arizona Downs;
5. Association of Racing Commissioners International (Model Rules Committee);
6. The Breeders' Cup:
7. California Horse Racing Board;
8. Churchill Downs (4 thoroughbred racetracks);
9. Colonial Downs;
10. Delaware Racing Commission;
11. Del Mar Racetrack;
12. Grants Pass Downs;
13. The Jockey Club;
14. The Jockeys' Guild;
15. Keeneland Association Inc.;
16. Kentucky Racing Commission;
17. Kentucky Thoroughbred Association;
18. Maryland Racing Commission;
19. National Horsemen's Benevolent and Protective Association;
20. New York Racing Association;
21. North American Association of Racetrack Veterinarians;
22. New York Thoroughbred Horsemen's Association;
23. Racing Medication and Testing Consortium (Scientific Advisory Committee);
24. Racing Officials Accreditation Program;
25. Stronach Racing Group (5 thoroughbred racetracks);
26. Thoroughbred Horsemen's Association Mid-Atlantic Safety Coalition;
27. Thoroughbred Owner's and Breeders Association;
28. Thoroughbred Safety Coalition;
29. Thoroughbred Racing Association of North America; and
30. Water Hay Oats Alliance.

During the same timeframe, videoconferences were conducted with numerous state racing commissions and a number of industry organizations. Prior to finalization of the submissions by the Authority to the FTC, working drafts of proposed regulations were made available to the public for review and comment on the Authority website https://www.hisausregs.org

5. **Please describe the way in which the FTC provides oversight of the Authority to ensure statutory deadlines are met, specifically the deadlines referenced in this letter?**

   See response to Question 3. See also Procedures for Submission of Rules under the Horseracing Integrity and Safety Act, 16 CFR Part 1 (attached).

6. **Are there any statutory deadlines that either the Authority or FTC, given your technical expertise, recommend Congress extending statutorily? If so, what date would you recommend Congress extend these statutory deadlines to?**

   The Authority does not recommend that Congress extend any statutory deadlines. The Racetrack Safety Program has been in effect since July 1, 2022 and the ADM Program is expected to go into effect on January 1, 2023. As discussed above, under controlling U.S. Supreme Court authority, the ADMC rules will become effective upon FTC approval, without the need for any further action from Congress.

As with any major regulatory reform, the Authority has encountered some opposition during its enormous efforts over the past many months to draft, propose, and implement the new FTC rules pursuant to the Act. Changes of this scale do not happen overnight. But such opposition should not obscure the incredible progress that the Authority has achieved to make the Act's promise a nationwide reality: reforming an industry that Congress recognized has long been plagued by a patchwork of inadequate and inconsistent state-by-state health and safety regulations. That progress could not have been made without the Authority's tireless engagement with stakeholders throughout the industry and regulators from every state. The Authority's work is only beginning, and much remains to be done, but the Act is well on its way to reforming the sport for the better.

Should you wish to discuss any of the above in more detail, I would be happy to travel to Washington D.C. or to participate in a videoconference. I fully understand how important horse racing is to your constituents, and how important it is to ensure that the Act's promise of nationwide reform is realized. There is nothing the Authority takes more seriously than its Congressional mandate to restore safety and integrity to the sport. I look forward to continuing the work together with you, the FTC, and stakeholders across the industry to make that happen.

Sincerely,

Lisa J. Lazarus

Lisa Lazarus
CEO, Horseracing Integrity and Safety Authority