



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

August 8, 2022

The Honorable Markwayne Mullin
2421 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Representative Mullin:

Thank you for your letter dated July 15, 2022, regarding the implementation of the Horseracing Integrity and Safety Act of 2020 (“the Act”). Your letter was jointly addressed to the Commission and to the Horseracing Integrity and Safety Authority, Inc.; below are responses to the questions presented in your letter to the extent that the Commission can answer.

- 1. If the Authority and the FTC had the legal authority to extend the implementation of the Anti-Doping and Medication Control Program, why not also extend the Racetrack Safety Program and registration requirements (with the Authority) to allow for sufficient time for a meaningful comment consideration and response period to the promulgation of the FTC-approved regulations?***

The Commission approves or disapproves proposed rules or proposed rule modifications that are submitted by the Authority, but it did not “extend the implementation of the Anti-Doping and Medication Control Program.” The Authority has not yet submitted a proposed rule on Anti-Doping and Medication Control. The Act provides the Commission with 60 days from the date that a proposed rule or proposed rule modification is published in the *Federal Register* to approve or disapprove the proposal, and the Commission has no discretion to extend this 60-day period.¹

- 2. How does the Authority and the FTC decide which parts of HISA are mandatory, like the FTC’s insistence it approves or disapproves a Rule published in the Federal Register within the statutory deadline; or flexible, like the Authority’s extension of the start date of for the Anti-Doping and Medication Control Program to January 2023 from the statutory date of July 1, 2022?***

Regarding the first portion of this question, the Commission takes its instructions from the Act’s text, which is unambiguous and mandatory.² The second portion of this question is best answered by the Authority.

¹ See 15 U.S.C. § 3053(c)(1) (“Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.”).

² See *id* (providing a 60-day window within which “the Commission *shall* approve or disapprove” (emphasis added)).

3. ***What records, in any form, were made (and kept) of the Authority’s promulgation of the Rules approved by the FTC? Have you made those records available to the public or Covered Persons under HISA, including the drafting, or any input into the drafting, of any such rules?***

The Commission accepts submissions of proposed rules and proposed rule modifications from the Authority and then, if a submission has the necessary elements outlined in Commission’s procedural rule, 16 C.F.R. § 1.142, publishes a notice in the *Federal Register* with the text of the proposed rule and the Authority’s description of its pre-submission solicitation of comments, the substance of those comments, its responses to and any changes adopted as a result of pre-submission comments, and the required elements of a “statement of basis and purpose.” Those elements include, among others:³

- (1) The reasons for adopting the proposed rule or modification.
- (2) Any problems the proposed rule or modification is intended to address and how the proposed rule or modification will resolve those problems.
- (3) A description of any reasonable alternatives to the proposed rule or modification that may accomplish the stated objective and an explanation of the reasons the Authority chose the proposed rule or modification over its alternatives.
- (4) How the proposed rule or modification will affect covered persons, covered horses, and covered horseraces.
- (5) Why the proposed rule or modification is consistent with the requirements of the Act and any rules and regulations applicable to the Authority [with further specifications for certain individual rules as provided by the Act].

In addition, all “supporting documentation” on which the Authority relied in developing its proposal must be submitted.⁴ This information, including state laws or other models, academic or veterinary publications, and the original copies of pre-submission comments, is not itself published in the *Federal Register*, but it is made available as “related documents” on the relevant docket on Regulations.gov where public comments are accepted.⁵ In addition, each rulemaking docket at Regulations.gov also retains every public comment that was posted.⁶

4. ***How many, and which, jurisdictions opted to enforce in part their own laws and regulations under a letter with the Authority? Under what legal authority is this authorized under HISA or any FTC-approved rule? Explain how this achieves uniformity throughout the states.***

The Authority is best positioned to answer this question.

³ 16 C.F.R. § 1.142(a).

⁴ *Id* § 1.142(b).

⁵ *See, e.g.*, Rulemaking Docket, FTC Seek Comments for the HISA Racetrack Safety Proposed Rule, Matter No. P222100 (“Browse Documents” tab), <https://www.regulations.gov/docket/FTC-2021-0076/document> (showing two related documents: “HISA Supporting Documentation Tables and Exhibits” and “HISA Pre-Submission Comments Received”).

⁶ *See, e.g., id* (“Browse All Comments” tab), <https://www.regulations.gov/docket/FTC-2021-0076/comments>.

5. ***After having allowed certain Covered Persons to register by email, will the Authority allow all other Covered Persons similarly register by cursory email? Will the Authority eliminate the “Terms and Conditions of Use” and the “Privacy Policy” on its registration website? What if/s] the Authority and FTC’s plan to enforce the Registration Rule uniformly between all Covered Persons?***

The Authority is best positioned to answer this question because the Commission does not enforce the Authority’s approved rules, such as the Registration Rule. The Commission may, however, bring an enforcement action under the new unfair or deceptive act or practice defined in 15 U.S.C. § 3059.

6. ***What is John Roach’s role as general counsel for the Authority? What statutory authority under HISA (or any other) or under any HISA FTC-approved regulation does he have to direct or create Authority policy for Covered Persons in (or otherwise direct) their compliance with HISA?***

The Authority is best positioned to answer this question.

7. ***Notwithstanding the pending (and future) legal challenges, if a jurisdiction requests the Authority to cover breeds other than Thoroughbreds under HISA, is the Authority prepared to do so now? If not, why? How is the application of HISA to Thoroughbreds and no other breeds nationally and within jurisdictions consistent with uniformity for horseracing safety and integrity?***

The Authority is best positioned to answer the questions as to its preparedness. The Act’s authors elected to cover only Thoroughbreds in the first instance with the possibility of other breeds coming under the Act if a “breed governing organization” or state racing commission so decides.⁷

8. ***These questions pertain to the HISA Registration Rule.***

- a) ***Please cite and explain the statutory authority for omitting the substance of the “Terms and Conditions of Use” and the “Privacy Policy” on the Authority’s registration website from the proposed and final HISA Registration Rule?***

As the Commission explained in its Order approving the Registration Rule proposed by the Authority and required by the Act:

“[T]he Act allows only those requirements in the text of approved rules or rule modifications to be applied to covered persons by the Authority when the Authority exercises its powers under the Act to seek or impose civil sanctions. Some [individuals who had called the Commission’s staff] complained about the routine terms of

⁷ See 15 U.S.C. § 3054(l) (providing that a “racing commission or a breed governing organization for a breed of horses other than Thoroughbred horses may elect to have such breed be covered by this chapter”).

service on the Authority’s registration website, but the Commission has not received those terms let alone approved them, so they cannot form the basis for any action the Authority might take in its role under the Act. Still, the Commission notes that, as of the date of publication of this Order, the terms of service callers found objectionable—those requiring registrants to agree to arbitrate any disputes, bring claims only in certain venues in Kentucky, broadly indemnify the Authority against claims, and waive the right to bring claims as a class—have been removed from the Authority’s website. Covered persons who registered when these terms were still included in the terms of service will not be held to have waived any substantive rights by registering.”⁸

- b) *Along those lines, does the Authority and FTC consider the “Terms and Conditions of Use” and the “Privacy Policy” part of the Registration Rule or any Authority rule or regulation?***

As explained in the response to question 8(a), only the text of the proposed rule that was published in the *Federal Register* for public comment was approved by the Commission, so the Authority’s website’s privacy policy or terms of service are not a part of the Registration Rule.

- c) *Is acceptance of the “Terms and Conditions of Use” and the “Privacy Policy” on the Authority’s registration website a condition precedent for the statutorily required registration with the Authority?***

No.

- d) *Does the Authority, and the FTC, consider the Authority constrained by or subject to compliance with other Federal laws (like the Privacy Act) or the United States Constitution in formulating the Registration Rule or the “Terms and Conditions of Use” or “Privacy Policy” on the Authority’s registration website?***

The Authority is constrained by and subject to compliance with applicable federal laws and the U.S. Constitution.

- e) *What “Proprietary Rights” does the Authority claim or seek to claim that involves any content by Covered Persons under the Act? Does the Authority intend or developed [sic] a rule to compensate Covered Persons under the Act whose likeness or personal information is incorporated into the Authority’s purported “Proprietary” content?***

The Authority is best positioned to answer this question.

⁸ FTC Order Approving HISA Registration Rule 5 n.10 (June 29, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderRegistrationRuleFinal.pdf.

f) Under what scenario(s) does the Authority envision that a Covered Person required to register on its website (under regulatory compulsion) needs to indemnify or hold harmless the Authority?

The Authority is best positioned to answer this question.

Thank you for your interest in the Commission's work to implement the Act. If you have any additional questions, comments, or information to share, please feel free to have your staff call Jeanne Bumpus, Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

A handwritten signature in cursive script that reads "Lina Khan".

Lina M. Khan
Chair, Federal Trade Commission