

THE HORSERACING  
INTEGRITY AND  
SAFETY ACT:

REVIEW  
ANALYSIS  
CONCERN



**F**or nearly a decade there has been an effort to have national legislation that governs Thoroughbred horse racing. The first major effort began in 2011, when the Interstate Horseracing Improvement Act of 2011—an attempt to amend the Interstate Horseracing Improvement Act of 1978—was introduced by Senator Tom Udall (D-NM). This bill was not successful. Another effort was advanced when, in 2015, Representative Andy Barr (R-KY) and Representative Paul Tonko (D-NY) introduced the Thoroughbred Horseracing Integrity Act. That same year, Representative Joe Pitt (R-PA) introduced the Horseracing Integrity and Safety Act (the first HISA). It too failed to pass. Fast forward to 2020: the Horseracing Integrity and Safety

Act is introduced by Representatives Barr and Tonko and passes in the U.S. House of Representatives on September 29, 2020. Senator Mitch McConnell (R-KY) then introduced corresponding legislation in the Senate that was approved. On December 28, 2020, President Trump signed into law a government funding bill and COVID-relief package. Tucked away into this massive omnibus bill was the Horseracing Integrity and Safety Act (HISA).

Since that time, there has been considerable reporting on HISA. Several issues have dominated the discussion of this new legislation. Those include the elimination of furosemide (also known as Lasix) on race day in two-year-olds and Stakes Thoroughbreds for the first three (3) years and, ultimately, in all Thoroughbreds after that.





A second issue receiving attention is how the new federal bill that places the United States Anti-Doping Association (USADA) at the head of the recently established Horse Racing Anti-Doping and Medication Control Authority will be funded. Additionally, there has been and continues to be discussion of whether the HISA, which presently only governs Thoroughbred racing, will ultimately include both Standardbred and Quarter Horse racing, as well. However, there is a section of the HISA that is critically important to those in the Thoroughbred industry that has received limited discussion. That is Section 1209 of the HISA.

For three primary reasons, Section 1209 of HISA is of particular concern for horsemen. First, it truncates the horsemen's constitutionally protected right to due process. Second, instead of replacing the state system(s) of regulatory enforcement, the HISA creates a second system of review and enforcement for alleged medication and track safety violations that results in both additional expense and redundancy. Finally, the HISA, as presented, guarantees a multitude of constitutional challenges.

Section 1209 of HISA entitled "Review of Final Decisions of the Authority" outlines the disciplinary process. Under the current systems, when a licensee elects to contest an alleged medication or safety violation, the dispute proceeds through an administrative law process followed by a judicial process.

Specifically, in most jurisdictions, the licensee accused of violating a medication or safety rule or regulation is first provided the opportunity to present a defense/response to the Stewards at a Stewards' hearing. If the Stewards' ruling is not favorable to the licensee, he or she may appeal that decision. The appeal of the Stewards' ruling is typically conducted by a state regulatory appointed administrative law judge (ALJ). The ALJ conducts a hearing on the merits and, in doing so, receives testimony and evidence from both the horseman/woman and the Commission. This is referred to as a merits hearing. At the conclusion of the merits hearing, the ALJ issues findings of fact, conclusions of law and a recommendation for a penalty or for no penalty. Either party may then appeal the decision/recommendation of the ALJ to the state commission for final administrative review. The ruling of the state commission, which in most jurisdictions constitutes the final stage of the administrative process, may also be timely appealed. It is at this juncture that the resolution process shifts from an administrative proceeding to a judicial proceeding via the filing of a petition for judicial review. Section 1209 of the HISA presents a departure from the current state regulatory system.

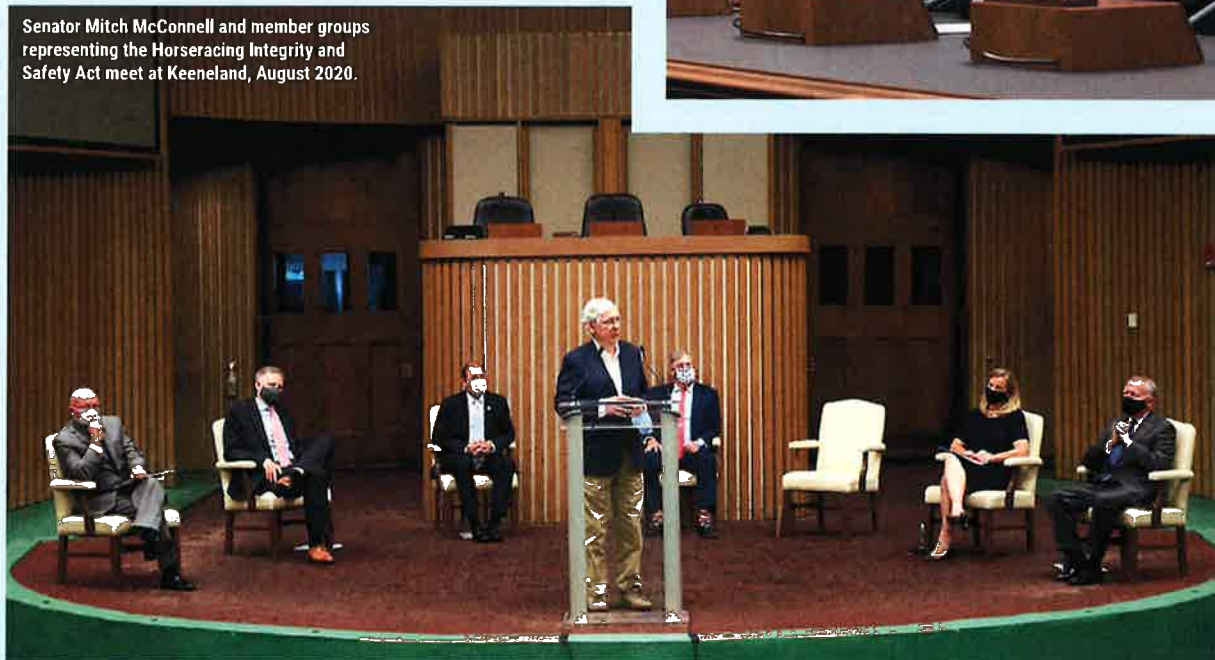
**BELOW: Representatives Andy Barr and Paul Tonko.**



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Senator Mitch McConnell and member groups representing the Horseracing Integrity and Safety Act meet at Keeneland, August 2020.



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LEFT: President Donald J. Trump signs the Consolidated Appropriations Act, 2021 which included the incorporation of the Horseracing Integrity and Safety Act, December 2020.

The process for hearing and review set forth in Section 1209 of the HISA begins with the “Authority.” The HISA defines the Authority as a private, independent and self-regulated non-profit corporation, comprised of nine members. When a medication or safety violation is identified by the Authority, an investigation commences. If the Authority concludes a violation has occurred, then the Authority determines sanctions and, in doing so, files notice of the sanctions with the Federal Trade Commission (FTC). It is unclear whether these nine members will sit in judgment as “the Authority” for the initial stage of an alleged violation or whether a sub-committee of the Authority will do so. Section 1209 is also unclear as to whether the proceeding before the Authority is a hearing on

the merits or not. This is critical to the horsemen because such a hearing establishes the record of the proceedings should the matter be appealed. What is clear is that the Authority replaces the current Stewards’ hearing in the present context of state commission proceedings.

Section 1209 of the HISA does provide for the right to appeal a noticed civil sanction by the Authority. Within 30 days of the notice of sanction being filed by the Authority with the FTC, the sanctioned party may file an Application for Review of the Authority’s decision. If an appeal is taken, the dispute is submitted to an ALJ. Pursuant to Section 1208 of the HISA, the ALJs are to be “impartial hearing officers,” although the HISA ALJs appear to be employees or agents of the FTC. This is significant to horsemen because the ALJ that conducts the merit hearing and rules on the admissibility of evidence and testimony, and ultimately issues findings of fact, conclusions of law, and a recommended penalty, will apparently be an employee of the FTC. In short, one side selects, appoints and pays the ALJ. That side is not the horsemen but rather the FTC. Considering the great lengths to which the HISA defines and prohibits “Conflicts of Interest” this makes this provision difficult, at best, to square with legislation that contains a specific “Conflict of Interest” provision, that being Section 3(E) of the HISA.

If either party is dissatisfied with the ALJ’s decision, they may then file an Application for Review with the Federal Trade Commission. The FTC may accept or deny the application for review (appeal). This is significant. Should the Commission refuse an application for review,







then the ALJ's decision shall constitute the final decision of the Commission without further proceedings and may then be appealed to a federal court of law. Should the FTC accept an Application for Review and issue a ruling in connection with that application, that ruling constitutes a final ruling and is appealable. Whether the Application for Review is rejected by the FTC or, alternatively, accepted by the FTC and ruled upon adversely to the licensee, there is a right to a timely appeal to the United States Court of Appeals.

Title 5, Chapter 7 of the United States Code provides for judicial review of agency action. Similar to a party petitioning for judicial review of a state agency's decision before a state court, 5 USC § 702 entitled "Right of Review" provides that: "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof..." See 5 USC § 702. The scope of review, set forth in 5 USC § 706, is also similar to a petition for judicial review before a state court. This means the federal court will not retry the case on the merits. Instead, as is the case in most state court proceedings involving a petition seeking review of an agency's final order, the federal court's authority in reviewing a final order of the FTC is limited to:

- "...(1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions to be found to be-
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title...or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court..."

Also similar to state court proceedings, parties subject to a decision of the U.S. Court of Appeals have the right to timely appeal. The court of last resort and final forum for appeal from an adverse decision issued by the U.S. Court of Appeals is the United States Supreme Court.

Section 1209 of the HISA is of further concern to horsemen because it will result in additional expense and creates a redundancy regarding the review process. The HISA provides that the Authority will sit in review of alleged medication and



track safety violations. However, non-medication and non-track safety violations will continue to be regulated, reviewed and enforced by state regulators/agencies. In short, there will be two paralleling systems. Proceedings before the Authority will be governed by the Code of Federal Regulations (CFR), Federal Trade Commission Regulations, the Administrative Procedures Act, and the Federal Rules of Evidence. If the licensee or "Covered Persons" is also accused of a non-medication or non-track safety violation, contemporaneous with a matter before the Authority, then that review process will proceed before a state agency and be governed by state administrative regulation, state rules of evidence and state regulatory rules. Therefore, a Thoroughbred trainer facing both medication violations and non-medication/non-track safety violations will be forced to navigate two paralleling disciplinary systems resulting in redundancy and additional expense to all involved. Further, these two paralleling systems of litigation may occur in different states. For example, the non-medication and non-track safety violations will be addressed by state regulators in the state in which the violation occurred. Medication and/or track safety violations will initially be heard by the Authority, likely in a different state. An initial Application for Review by an FTC-appointed ALJ, and a subsequent Application for Review may well be held at its offices in Washington, D.C. Further application for review will be heard before one of the 11 U.S. District Court of Appeals, more likely than not located in a state other than where the alleged violation occurred and, should there be a final appeal, that would occur before the U.S. Supreme Court in Washington, D.C. In summary, and to be clear, the HISA does not replace the entire review and enforcement function of the state commission. It does so only with regard to medication and track safety issues.

The HISA is guaranteed to face multiple constitutional challenges by covered persons, horsemen associations, as well as constitutional "watchdog" groups. These are four anticipated constitutional challenges. First, that the HISA violates the Non-Delegation Doctrine of the United States Constitution.



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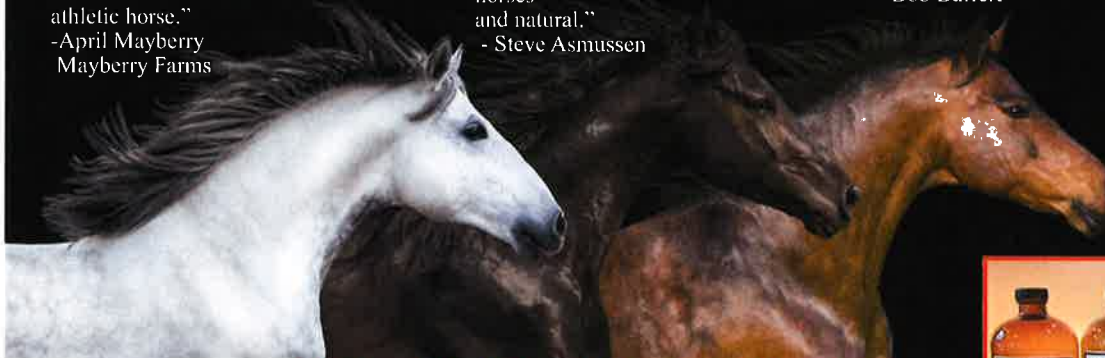
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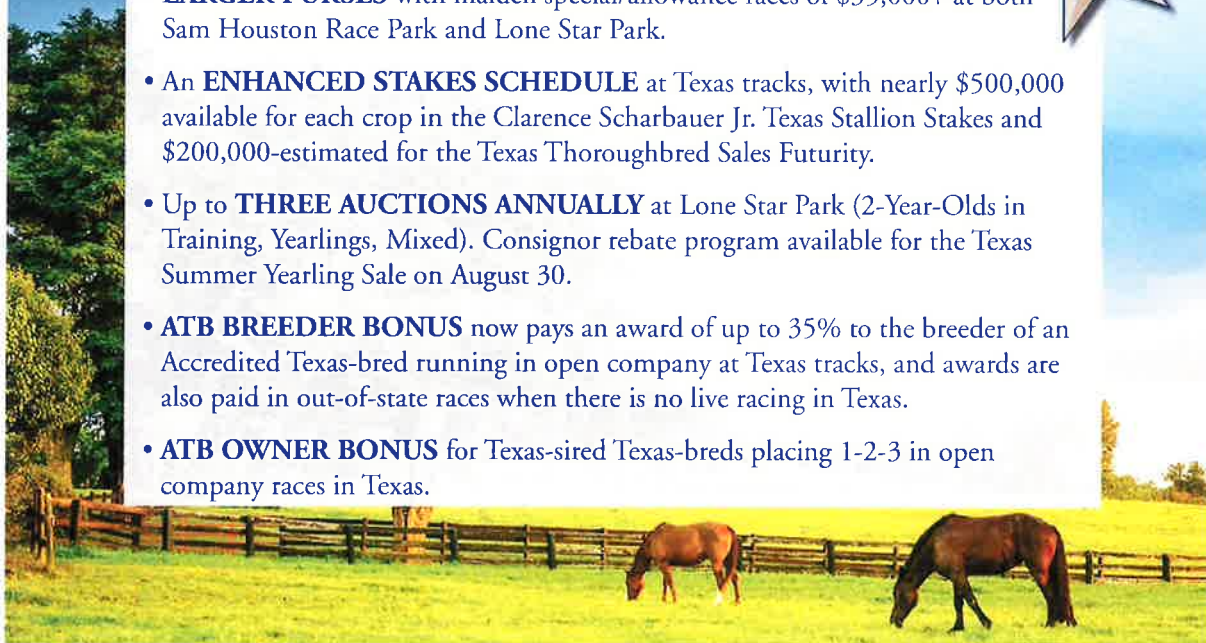
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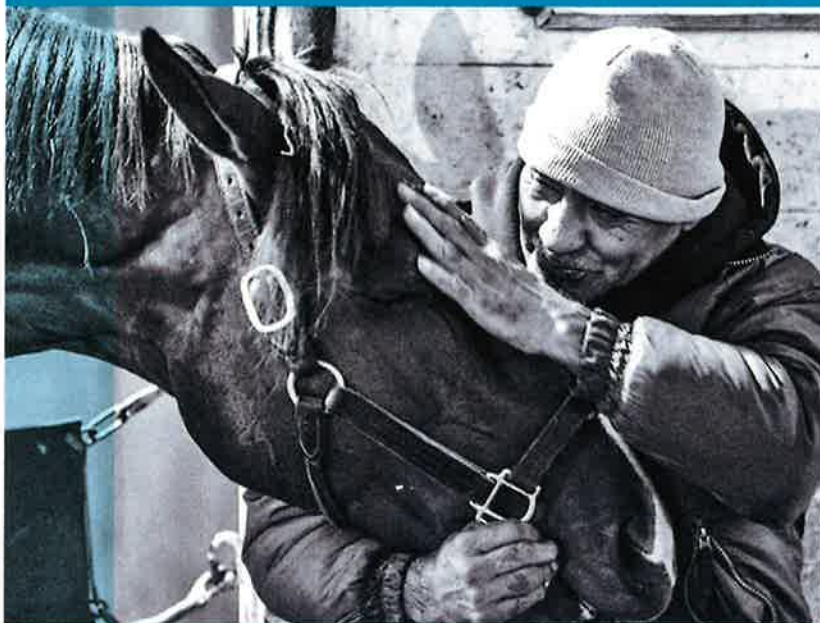
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THE HISA,  
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< The Non-Delegation Doctrine provides that Congress is prevented from delegating legislative authority to any other entity. Second, that HISA violates the Appointment Clause of the U.S. Constitution. The Appointment Clause requires that appointments to public agencies be made only by the Executive Branch as set forth in Article II of the Constitution. Third, that HISA violates rules prohibiting Anti-Commandeering. The U.S. Supreme Court has held that Congress “may not issue direct orders to the governments of the states.” Congress may not commandeer the State’s offices or those of their political subdivisions to administer or enforce a federal regulatory program.

The fourth anticipated constitutional challenge involves the Due Process Clause of the U.S. Constitution. The fourteenth amendment of the U.S. Constitution guarantees both procedural and substantive due process. Procedural due process requires the right to reasonable notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Substantive due process requires that there must be a rational relationship between a legitimate governmental purpose of a regulation (such as protecting the integrity of racing) and the means chosen for that desired end (the rules governing racing). The licensee/protected person’s due process rights, under the HISA, are at best, truncated. This is because the allegation of a medication and/or safety violation will be heard, on the merits, by an ALJ that is an employee, selected by, appointed by and paid by the overseeing regulatory agency—that being the FTC. Further, very, very few of those participating in horse racing will have the appetite or resources to appeal an ALJ’s findings of fact, conclusions of law and recommended order (assuming the FTC declines review) to a U.S. Court of Appeals. This is because such a legal proceeding costs thousands and thousands of dollars in fees. In short, due process is effectively eliminated by Section 1209, and the licensee/

covered person is left with the “choice” of “take the deal” offered by the regulators. Additionally, the Due Process Clause of the U.S. Constitution prohibits an economically self-interested private actor from wielding regulatory power over private parties.

The first constitutional challenge to the HISA which seeks declaratory and injunctive relief was filed on March 15, 2021, less than 100 days after the HISA was signed into law, a group of representative associations formally challenged the Horseracing Integrity and Safety Act. The party plaintiffs include the National Horsemen’s Benevolent and Protective Association (NIIBPA) and its affiliate organizations in Arizona, Arkansas, Indiana, Illinois, Louisiana, Nebraska, Oklahoma, Oregon, Pennsylvania, and Washington. Also joining in as a plaintiff is the Mountaineer Park Horsemen’s Benevolent and Protective Association.

This cause of action names as defendants the seven members of the Nominating Committee for the Horseracing Integrity and Safety Act, those being Jerry Black, Katrina Adams, Leonard Coleman, Jr., Nancy Cox, Joseph Dunford, Frank Keating, and Kenneth Schanzer. Also named as defendants are the Horseracing Integrity and Safety Authority, Inc, the FTC, the Acting Chair of the Federal Trade Commission, and the three Federal Trade Commissioners.

This claim has been filed in the U.S. District Court for the Northern District of Texas. The plaintiffs seek an order declaring that the HISA delegates legislative authority to the Horseracing Integrity and Safety Act Authority in violation of the Non-Delegation Doctrine and that the HISA violates the Appointment Clause of the U.S. Constitution. Further, their action seeks a ruling and finding that the HISA violates the Due Process Clause of the U.S. Constitution because it provides the economically self-interested actors the power to regulate their competitors. Finally, the plaintiffs, by way of their complaint, seek a court order enjoining or prohibiting the defendants from taking any action to implement the Horseracing Integrity and Safety Act of 2020.

The HISA, should it survive anticipated constitutional challenges, will have a major impact on those in the horse racing industry. Stay tuned. It is likely that HISA will remain a centerpiece of discussion and debate in our industry for the next several years. ■