

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Christine S. Wilson
 Alvaro M. Bedoya

**ORDER DISAPPROVING THE ANTI-DOPING AND MEDICATION CONTROL RULE
PROPOSED BY THE HORSERACING INTEGRITY AND SAFETY AUTHORITY**

December 12, 2022

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. §§ 3051–3060, tasks a self-regulatory nonprofit organization, the Horseracing Integrity and Safety Authority, with developing proposed rules on a variety of subjects. *See id.* § 3053(a). Those proposed rules and later proposed rule modifications take effect only if approved by the Federal Trade Commission. *See id.* § 3053(b)(2). At issue here is the Authority’s Anti-Doping and Medication Control proposed rule, which the Authority submitted and the Commission published for public comment in the Federal Register¹ (the “Notice”), as required by the Act. *See id.* § 3052(f).

“The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with” the Act and the Commission’s procedural rule. *Id.* § 3053(c)(2). By this Order, for the reasons that follow, the Commission disapproves the proposed rule as inconsistent with the Act but without prejudice as to its merits.

The bedrock principle of the Act is the need for uniformity: “Rules, standards, procedures, and protocols regulating medication and treatment methods for covered horses and

¹ *See* Fed. Trade Comm’n, *Notice of HISA Anti-Doping and Medication Control Proposed Rule* (“Notice”), 87 Fed. Reg. 65292 (Oct. 28, 2022), <https://www.federalregister.gov/documents/2022/10/28/2022-22970/hisa-anti-doping-and-medication-control-rule>; Fed. Trade Comm’n, *Correction to Notice of HISA Anti-Doping and Medication Control Proposed Rule*, 87 Fed. Reg. 66701 (Nov. 4, 2022), <https://www.federalregister.gov/documents/2022/11/04/2022-24016/hisa-anti-doping-and-medication-control-rule-correction> (collectively, “Notice”).

covered races should be uniform and uniformly administered nationally,” and racetracks should follow a “uniform set of training and racing safety standards and protocols.” *Id.* §§ 3055(b)(3), 3056(b)(2). Here, however, the Commission’s approval of the Anti-Doping and Medication Control proposed rule would not result in uniformity because the Horseracing Integrity and Safety Act has been held unconstitutional by a panel of the United States Court of Appeals for the Fifth Circuit.² If that decision remains undisturbed, the proposed rule may be unenforceable in the States that are the plaintiffs in the Fifth Circuit action and in other States within the Fifth Circuit. In addition, because Commission approval of the proposed rule would result in the rule’s taking effect on January 1, 2023, but the Fifth Circuit’s mandate is due to issue on January 10, 2023, confusion could result for industry participants and regulators in the jurisdictions affected by the Fifth Circuit’s decision, as the rule takes effect one week only to be rendered potentially unenforceable the following week.

The Commission therefore disapproves the proposed rule without prejudice. If the legal uncertainty regarding the Act’s constitutionality comes to be resolved, the Authority may resubmit the proposed rule or a similar rule, and the Commission will consider all comments filed in this proceeding as well as any updated or new comments and filings.³ In the meanwhile, and until any future proposed rule on the subject is approved by the Commission, State law will continue to regulate the matters that the proposed rule would have covered.⁴

² See *Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, No. 22-10387, -- F.4th ---, 2022 WL 17075011, at *11–15 (5th Cir. Nov. 18, 2022) (declaring the Horseracing Integrity and Safety Act unconstitutional because the Commission’s inability to modify the Authority’s rules runs afoul of the private non-delegation doctrine). A separate matter raising similar issues is presently before the United States Court of Appeals for the Sixth Circuit.

³ The Commission appreciates that many commenters, both in support of and in opposition to the proposed rule, took time to develop detailed and thoughtful submissions. See Cmts., HISA Anti-Doping and Medication Control, <https://www.regulations.gov/docket/FTC-2022-0062/comments>.

⁴ See 15 U.S.C. § 3054(b). See also Guidance of the Horseracing Integrity & Safety Auth. 1 (Mar. 14, 2022), <https://static1.squarespace.com/static/604f6ab712afe14e11227976/t/6388d833e16e902ac975f12c/1669912627969/HISA+Guidance+3.14.22.pdf>. This guidance became effective when it was submitted to the Commission on March 14, 2022. See 15 U.S.C. § 3054(g)(3).

For the preceding reasons, the Commission DISAPPROVES without prejudice the Horseracing Integrity and Safety Authority's proposed rule on Anti-Doping and Medication Control.

By the Commission, Commissioner Wilson abstaining.

April J. Tabor
Secretary