

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

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

**ORDER APPROVING THE ASSESSMENT METHODOLOGY RULE MODIFICATION
PROPOSED BY THE HORSERACING INTEGRITY AND SAFETY AUTHORITY**

January 9, 2023

I. Decision of the Commission: The Authority’s Assessment Methodology Proposed Rule Modification Is Approved

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). Its proposed rules and rule modifications take effect only if approved by the Federal Trade Commission. *See id.* § 3053(b)(2). At issue here is the Authority’s Assessment Methodology proposed rule modification, 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). It would modify the Assessment Methodology rule previously approved by Commission Order.²

“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 applicable rules approved

¹ *See* Fed. Trade Comm’n, *Notice of HISA Assessment Methodology Proposed Rule Modification* (“Notice”), 87 Fed. Reg. 67915 (Nov. 10, 2022), <https://www.federalregister.gov/documents/2022/11/10/2022-24609/hisa-assessment-methodology-rule-modification>.

² *See* Fed. Trade Comm’n, *Order Approving the Assessment Methodology Rule Proposed by the Horseracing Integrity & Safety Auth.* (“Assessment Methodology Order”), at 1, ___ F.T.C. ___ (Apr. 1, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Order%20re%20HISA%20Assessment%20Methodology.pdf; *see also* Fed. Trade Comm’n, *Notice of HISA Assessment Methodology Proposed Rule*, 87 Fed. Reg. 9349 (Feb. 28, 2022), <https://www.federalregister.gov/documents/2022/02/18/2022-03717/hisa-assessment-methodology-rule> (containing the text of the Assessment Methodology proposed rule as submitted by the Authority).

by the Commission. *Id.* § 3053(c)(2). By this Order, for the reasons that follow, the Commission finds that the Assessment Methodology proposed rule modification is consistent with the Act and the Commission’s procedural rule and therefore approves the proposed rule modification.

II. Discussion of the Commission’s Findings

Under the Act, the Commission must approve a proposed rule modification if the Commission finds that the proposed rule modification is consistent with the Act and the Commission’s procedural rule, 16 C.F.R. §§ 1.140–1.144. As a threshold matter, the Commission finds that the Authority’s Assessment Methodology proposed rule modification is consistent with the procedural rule. This finding formally confirms the previous determination made by the Office of the Secretary of the Commission that the Authority’s submission of its proposal was consistent with the Commission’s procedural rule.³

The remainder of this Order discusses whether the Assessment Methodology proposed rule modification is “consistent with” the Act. In deciding whether to approve or disapprove the Authority’s proposed rule modification, the Commission reviewed the Act’s text, the Notice containing the proposed rule modification’s text and the Authority’s explanation, and the Authority’s supporting documentation.⁴ Only two comments were filed, but neither related to

³ See Notice, 87 Fed. Reg. at 67915 & n.5. The Secretary’s determination that a submission complies with the procedural rule is required before its publication. See 16 C.F.R. § 1.143(e) (“The Secretary of the Commission may reject a document for filing that fails to comply with the Commission’s rules for filing”); see also Fed. Trade Comm’n, Order Approving the Racetrack Safety Rule Proposed by the Horseracing Integrity & Safety Auth. 2, ___ F.T.C. ___ (Mar. 3, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_racetrack_safety_2022-3-3_for_publication.pdf; Fed. Trade Comm’n, Order Approving the Enforcement Rule Proposed by the Horseracing Integrity & Safety Auth. 2, ___ F.T.C. ___ (Mar. 25, 2022), <https://perma.cc/H9SJ-F9WA>; Fed. Trade Comm’n, Order Approving the Registration Rule Proposed by the Horseracing Integrity & Safety Auth 2, ___ F.T.C. ___ (June 29, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderRegistrationRuleFinal.pdf; Assessment Methodology Order at 2.

⁴ See Horseracing Integrity & Safety Auth., *Assessment Methodology Proposed Rule Modification Supporting Documentation*, <https://www.regulations.gov/docket/FTC-2022-0068/document> (containing, in Exhibit A, the comments that the Authority had received in its informal pre-submission solicitation from horseracing stakeholders and, in Exhibit B, a redline version showing how the proposed rule modification would alter the existing rule).

this proposal, so they were not posted on the docket at <https://www.regulations.gov>.⁵ As explained above and in the Notice, the Commission’s statutory mandate to approve or disapprove an Authority proposed rule or modification turns on whether the proposed rule or modification “is consistent with” the Act and the Commission’s procedural rule.⁶

The Notice explains that there are four principal changes in the proposed rule modification: (1) clarifications to avoid ambiguity around dates in the rule; (2) “providing a True-Up Calculation based on actual rather than projected starts and purse starts”; (3) “providing alternative calculation methods should a court enjoin the enforcement of Rule 8500 based on the use of Projected Purse Starts”; and (4) “addressing the scenario of a State racing commission’s electing to remit fees after the initial election date to remit fees.”⁷

The proposed amendments to the dates specified in the rule respond to commenters’ identification of an ambiguity and seek to “provide greater clarity to the deadlines set forth” for the Authority to notify state racing commissions or Covered Racetracks of the amounts they owe under 15 U.S.C. § 3052(f) and the Assessment Methodology rule. These clarifications present no conflict with the Act.

The proposed “True-Up Calculation” accounts for the fact that the “amount required”

⁵ Public comments were accepted until November 25, 2022, for posting at <https://www.regulations.gov/docket/FTC-2022-0064/comments>. With other proposed rule that have received relevant public comments, the Authority has submitted a response to the public comments, but it did not do so in this case since no relevant public comments were received.

⁶ 15 U.S.C. § 3053(c)(2). Just after the Notice was published in November 2022, the United States Court of Appeals for the Fifth Circuit declared the Act unconstitutional. *See Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black*, No. 22-10387, 53 F.4th 869, 884–90 (5th Cir. 2022) (concluding that Commission’s inability to modify the Authority’s rules violated the private non-delegation doctrine). Congress responded to the decision by amending the Act to provide the Commission with broader power to add to, delete, or modify substantive horseracing rules and to ensure the fair administration of the Authority. This amendment was signed into law at the end of December 2022. *See Consolidated Appropriations Act, 2023*, H.R. 2617, 117th Cong., div. O, tit. VII, § 701 (2022) (to be codified at 15 U.S.C. § 3053(e)). Congress did not amend § 3053, which governs the Commission’s review of the Authority’s proposed rules.

⁷ Notice, 87 Fed. Reg. at 67915. This Order assumes familiarity with the existing Assessment Methodology rule and the Commission’s Order approving it.

from state racing commissions or Covered Racetracks for the coming year is based on projections of how many covered horses will race and for what purse amounts.⁸ A proposed “new subsection requires the Authority to ‘true-up’ the projected start and purse start amounts with the actual numbers for these amounts” at the end of the year.⁹ If, for example, a state that anticipates a heavy horseracing schedule for the following year suffers a natural disaster that interrupts horseracing for a substantial amount of time, the “True-Up Calculation” would ensure that the state did not substantially overpay. The proposed “True-Up Calculation” of new Rule 8520(f) advances the Act’s principles that payments reflect a state’s “proportionate share” of the programmatic costs. 15 U.S.C. § 3502(f)(1)(C)(i).

The proposed Rule 8520(g) sets forth “alternative calculation methods” that may be used in the event that the Assessment Methodology rule’s principal method of allocating fees is found by a court to be inconsistent with the Act.¹⁰ The original Assessment Methodology rule provides that each state’s proportionate share of costs be calculated based not only on projected starts (i.e., the total number of horses that race in covered races) but also based on projected purse (i.e., the amount of winnings for covered races). As the Commission explained in its Order approving the rule, the effect of the calculation is to ensure that relatively high-purse states such as Kentucky pay more than low-purse states such as West Virginia, which advances the Act’s goal of equitable allocations.¹¹ If the purse-and-starts calculation is found to be inconsistent with the Act

⁸ 15 U.S.C. § 3052(f)(1)(C)(i).

⁹ Notice, 87 Fed. Reg. at 67519.

¹⁰ The United States District Court for the Western District of Louisiana entered an injunction after finding that the Assessment Methodology rule’s use of purses likely violated the Act. *See Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, No. 22-cv-1934, 2022 WL 2960031, at *10–11 (W.D. La. July 26, 2022). The United States Court of Appeals for the Fifth Circuit declined to reach the merits of the appeal from the injunction because of its decision in a related case, *National Horsemen’s Benevolent and Protective Association*, in which the Fifth Circuit declared the whole Act unconstitutional. *See supra* n.6. Because Congress’s amendment to the Act likely resolved the constitutional deficiency identified by the Fifth Circuit, litigation in the *Louisiana* matter is ongoing.

¹¹ *See* Assessment Methodology Order at 9–10.

and enjoined by a court, new Rule 8520(g) would provide for fees to be assessed based only on starts—a methodology that would be consistent with a court’s finding that the Act permits only starts to be considered.¹²

The final proposed change to Assessment Methodology allows a state to elect to remit fees even after the first year of the Authority’s operations. The original Assessment Methodology rule contemplated such elections only in the year of the program effective date, 2022. The proposed new language provides: “If a State racing commission elects to remit fees pursuant to 15 U.S.C. 3052(f)(2) for any subsequent calendar year, the State racing commission shall notify the Authority in writing on or before 30 days from the receipt of the estimated amount provided to the State racing commission pursuant to Rule 8520(b).”¹³ An additional change would permit states that elect to remit fees to make a partial payment, with the rest provided under Rule 8520(e), the provision for states that do not elect to remit fees. These changes present no apparent conflict with the Act.

In sum, the proposed rule modification to Assessment Methodology makes a series of small improvements and clarifications along with providing for a backup “alternative calculation” that may be used in the event that a court finds the original rule’s purse-plus-starts calculation to be inconsistent with the Act. Although the Commission did not receive any public comments on this proposed rule modification, the Commission’s independent review confirms that the proposed rule modification is consistent with the Act.¹⁴

¹² See Notice, 87 Fed. Reg. at 67919.

¹³ Notice, 87 Fed. Reg. at 67916.

¹⁴ The Commission recently issued an Order ratifying all its previous Orders approving the Authority’s proposed rules to avoid any doubt about their ongoing force and effect. See Fed. Trade Comm’n, Order Ratifying Previous Commission Orders as to Horseracing Integrity & Safety Authority’s Rules 2–3 (Jan. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/HISA%20Order%20re%20Ratification%20of%20Previous%20Orders%20-%20Final%20not%20signed.pdf. As that Order stated, Congress’s recent amendment to the Act provides the Commission with a broader rulemaking power to oversee the Authority and its rules. Interested persons are encouraged to participate in the Commission’s horseracing-oversight work by providing public comments in

For the preceding reasons, the Commission finds that the Horseracing Integrity and Safety Authority's Assessment Methodology proposed rule modification is consistent with the Horseracing Integrity and Safety Act of 2020 and the Commission's procedural rule governing submissions under the Act. Accordingly, the Assessment Methodology rule modification is APPROVED.

By the Commission, Commissioner Wilson abstaining.

April J. Tabor
Secretary

response to Federal Register Notices that contain the Authority's proposed rules as well as by filing petitions for rulemaking under Commission Rule 1.31, 16 C.F.R. § 1.31, and commenting on rules proposed by the Commission using its new power.