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Monday, January 9, 2023

April Tabor, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2222

Dear Secretary Tabor,

On Thursday, January 5, 2023, *Horse Racing Nation*, a well-regarded horseracing news website, reported that the Horseracing Integrity and Safety Authority (“the Authority”) has submitted a proposed anti-doping and medication control (ADMC) rule for approval on an unprecedented accelerated timeframe. Authority CEO Lisa Lazarus is quoted as saying:

“We resubmitted the anti-doping rules. And we’re hopeful and optimistic that we’ll be able to implement them, probably around mid-March,” Lazarus said. “Obviously, it’s dependent on the FTC, when they post in the federal register, when they actually approve them. But that’s our current expectation of what the timeline looks like.”
Carolyn Greer, *Lazarus is ‘very optimistic’ about federal racing agency’s future*, *Horse Racing Nation* (January 5, 2023).

When this Commission declined the Authority’s proposed ADMC rule the first time, it said the Authority should not submit a similar rule until “the legal uncertainty regarding the Act’s constitutionality comes to be resolved.” ORDER DISAPPROVING THE ANTI-DOPING AND MEDICATION CONTROL RULE (Dec. 12, 2022) p2.

The legal uncertainty regarding the Act is far from resolved, and the Commission should not presume the outcome of the decisions from the U.S. Courts of Appeals for the Fifth or Sixth Circuits. The U.S. Court of Appeals for the Sixth Circuit has ordered supplemental briefing due on January 12. The U.S. Court of Appeals for the Fifth Circuit has not set a briefing schedule, but the Federal Rules of Appellate Procedure provide the National H.B.P.A. until January 13 to respond. Fed. R. App. Proc. 27. The Authority will then have a further seven days to file a reply brief. *Id.*

In either case, we expect it will take several weeks if not months for the judges to digest all of those filings, write opinions, and issue rulings. And then, as in the initial instance, the mandate for those rulings will not take effect for 45 days. Fed. R. App. Proc. 40. It would be incredibly disrespectful to the judges of those courts to presume the outcomes of their decisions before they are rendered.

Additionally, the Commission’s procedural rule requires “the Authority to provide the information it needs to evaluate the Authority’s proposed rule or modification at least 90 days in advance of the date the Authority proposes having its proposed rule or modification published in the **Federal Register** for public comment. . . .” It should be noted this 90-day timeframe serves as a minimum, not a maximum, timeframe. 86 Fed. Reg. 54819, 54822. Next comes the 60 days provided in the Act for the Commission to

hold public comment and a vote on any proposed rule. *Id.* In its order declining the ADMC proposal without prejudice, the Commission promised an opportunity for “updated or new comments and filings” on resubmission after the legal uncertainty ends. ORDER p2.

To achieve a mid-March timeframe, the Authority is presuming not only the outcome of the judges’ decisions, but also that you will use your authority to “shorten the [90-day] timeframe if the Authority demonstrates that a shorter timeframe is necessary to meet statutory deadlines.” 86 Fed. Reg. at 54822.

You should not use your discretion to shorten the timeframe in this instance for four reasons. Most importantly, many of the qualifying races for the Kentucky Derby occur in “points races” in February and March. It would be substantially disruptive and unfair to have some points races run under one set of rules, and other points races run under a different set of rules. It would also be unfair to run qualifying races under one set of rules, and then have the Triple Crown races themselves run under a different set of rules for those horses that qualified. There is a reason that the Authority and Act initially used July 1 and January 1 dates – they make the most sense to implement rules at low-tides in the racing schedule. A mid-March implementation date would change the rules in the middle of the racing season.

Second, you should decline to use your discretion to shorten the FTC’s internal review period because the statutory deadline for the AMDC was July 1, 2022. The reason that date was not achieved was because the Authority unilaterally blew past it. The Authority cannot persuasively demonstrate the immediate enactment of the ADMC rule is a crisis when it is a crisis largely of its own making.

Third, the 90-day period serves an important purpose for the Commission: “[t]o ensure it has sufficient time for review” the numerous documents that supplement and support a rule proposal. 86 Fed. Reg. at 54822. This 90-day period is important not only for the Commission to review the submitted materials, but also for stakeholders to review them in preparation for filing thoughtful, thorough public comments that take into account the full administrative record. To eliminate that window entirely would substantially undermine the Commission’s ability to do its review and the public’s ability to submit helpful comments.

Fourth, in that same press conference, Ms. Lazarus promised greater transparency and stakeholder engagement as part of an effort to build trust. She also praised the FTC’s purportedly expanded review under the amended act. Those words ring very hollow when her very next action is to ask the FTC to eliminate its analysis period and push the rule straight through.

If the Commission wishes to build trust with participants in the horseracing industry, it should not force transformative rules change onto the industry mid-season and it should not allow potentially unconstitutional/unlawful regulations to become effective. The Commission should wait until the legal cases have been finally resolved as it promised in its Order.

Sincerely yours,



Eric J. Hamelback, CEO, National HBPA