

The Horseracing Integrity and Safety Act: What We Know, and What We Don't

The 2021 Racing and Gaming Conference at Saratoga, held Aug. 16-17 at Saratoga Race Course in New York, kicked off with two panels on the Horseracing Integrity and Safety Act. At the end of the first morning, there had been more questions raised than answered.



What led to the implementation of federal regulation for Thoroughbred horse racing? Currently, the 33 jurisdictions that host Thoroughbred racing are governed by rules adopted by each state. There has been significant progress in crafting nationwide standards for medication and safety. The [National Uniform Medication Program](#), which was launched in 2014, created a Controlled Therapeutic Substance List and Guidelines, required accreditation by the Racing Medication and Testing Consortium for all testing labs, mandated third-party administration for Lasix, and established a penalty system for multiple medication violations. The 2019 [Mid-Atlantic Plan to Reduce Equine Fatalities](#) has produced regulations, protocols and best practices designed to protect the horses, the jockeys and the integrity of the sport.

Unfortunately, participation in these programs is not mandatory. While many states are fully on board, there has not been unanimous support and implementation.

Alan Foreman, the Chairman and CEO of the Thoroughbred Horsemen's Association, was one of three members of the first panel at the Racing and Gaming Conference, along with Patrick Cummings, the executive director of Thoroughbred Idea Foundation, and Pete Sacopulos, partner at the law firm of Sacopulos, Johnson and Sacopulos.

Foreman has been at the forefront of the national initiatives and was long an opponent of federal regulation, but he has changed course.

"We have not moved as society has moved," Foreman said. "The public doesn't accept that we're doing right by our horses. We never really recovered from the breakdowns at Santa Anita, and then we had the Servis and Navarro indictments and the positive in the Derby. The hits just kept coming. Now we have a once in a lifetime opportunity to fix this for the next generation. It's a monstrous undertaking, and we can't accomplish it independently and voluntarily."

Cummings added, "We're playing with different rules in different states. You can say that bettors need to be attentive, but you're not doing your customers a service with the state by state approach."

Foreman concluded, "HISA is not perfect, but you can't let the perfect get in the way of the good."

What We Know

The 66-page Horseracing Integrity and Safety Act was signed into law on Dec. 27, 2020. You can [click here](#) for the full text of the bill. The mission of HISA is "to improve the integrity and safety of horseracing by requiring a uniform anti-doping and medication control program to be developed and enforced by an independent Horseracing Anti-Doping and Medication Control Authority." HISA is specific to Thoroughbred racing. Harness and Quarter horse racing may be covered under the bill, but that is not a requirement. The program goes into effect on July 1, 2022.

The Authority is governed by a [nine-member board of directors](#), with five of the members chosen from outside the horse industry. The chair, elected by the board, is Charles Scheeler, a retired attorney from Maryland who served as lead counsel in the investigation of performance-enhancing substance use in Major League Baseball. There are two standing committees, one to oversee anti-doping and medication control, and one charged with developing a racetrack safety program. The Federal Trade Commission will provide oversight for the Authority.

Bennett Liebman, the moderator for the first HISA panel, provided the following timeline for implementation of the bill.

March 2, 2022 (120 days prior to the effective date): Proposed rules must be issued by the FTC for public comment. The Authority must also establish a disciplinary process by this date.

April 1, 2022 (90 days prior to the effective date): The Authority must provide State Racing Commissions with an estimate of the amount of funding required from each state. The State Racing Commissions can elect to collect the necessary fees, or not.

May 1, 2022 (60 days prior to the effective date): Any State Racing Commission that elects to collect the necessary fees must notify the Authority.

“It’s going to take incredible work by the Authority to make this work,” Liebman said. “The task is just daunting.”

What We Don’t Know

What rules will govern Thoroughbred horse racing? What will HISA cost and who will pay for it? Who will enforce the rules? How will violations be adjudicated? Will Lasix be phased out by 2025? Will the lawsuits delay or derail implementation of HISA? All of these questions remain to be answered.

Proposed Rules

The Authority will utilize guidelines established by a variety of entities to come up with the initial draft of proposed rules, relying on the World Anti-Doping Agency, International Federation of Horseracing Authorities and Association of Racing Commissioners International for medication rules, and the National Thoroughbred Racing Association, International Federation of Horseracing Authority’s International Program and British Horseracing Authority’s Equine Health and Welfare Program for racetrack safety rules.



During the Aug. 15 The Jockey Club Round Table Conference on Matters Pertaining to Racing, HISA Chair Charles Scheeler indicated that draft rules would be available for review by the industry and the public sometime in the fall. He is looking for input from the industry as the rules are created.

“We will be reaching out – and we have already started this process – to the State Racing Commissions, to the industry groups, to be very inclusive in this process,” Scheeler said.

HISA may opt to amend the draft rules based on the initial review, and then will submit the proposed rules to the FTC by the end of the year. The industry will have a second opportunity to weigh in during the 60-day public comment period that starts March 2, 2022.

Funding

During The Jockey Club Round Table, Chairman Scheeler stated, "This program is going to cost money. And it's going to cost more money than the industry has traditionally allocated for services such as these. But if you look at the industry today, the 'status quo' is not an option. These program costs should not be looked at as expenses. They should be looked at as investments in strengthening the industry and ensuring its future."

HISA has until April 1, 2022, to come up with a budget. According to the bill, the cost per state will be based on the number of starts in that state. If a State Racing Commission elects to collect the fees, it will be up to that Racing Commission to allocate the cost among its stakeholders. Fees could be assessed on racetracks, foal registrations, sales contributions, or as per-start fees for owners. It remains to be seen if other factors, such as purse structure, will be considered when fees are assessed. If the State Racing Commission declines to collect the fees, that task will fall to the Authority.

Patrick Cummings expressed concern that the bettors will share in the cost. "There is a fear among bettors that increased takeout will come to pay for this," he said.

Pete Sacopulos projected, "This will up the ante, and the small time guys won't be able to participate. There will be a contraction in the industry."

Ed Martin, president of Association of Racing Commissioners International, added another wrinkle.

"Racing commissions don't have the legal authority to assess fees on an industry, or to provide services for a fee," Martin said. "You have to go to state legislatures to get that authority. It might not happen in some states."

Enforcement

HISA has the ability to contract with USADA to enforce the medication and anti-doping rules, and with State Racing Commissions to enforce the racetrack safety rules. USADA can then contract with State Racing Commissions to assist in enforcement of medication and anti-doping rules.

"The Authority will enter into an agreement with the State Racing Commissions to enforce HISA," Foreman predicted. "It's simply impractical to do it otherwise."

State Racing Commissions are under no obligation to partner with HISA, but Ed Martin said, "With few exceptions, the Racing Commissions are working to cooperate on the implementation of HISA."



Violations

HISA has until Mar. 2, 2022, to unveil the process to be followed in the event of a violation. Provisions in the rules will include notification, hearing procedures, standards for burden of proof, evidentiary rules, the appeals process, and the reporting of rulings. There is significant concern that navigating the system will become more challenging.

Currently, in the event of a violation, penalties are issued and the defendant can either accept the penalty or request a hearing. At the hearing, evidence can be submitted and witnesses can be called. At the conclusion of the hearing, there is a recommendation of penalty, then there is the opportunity for a timely appeal.

"Under HISA, you start off with a disciplinary procedure, based on what we know so far - we really don't know what the rules will end up to be," attorney Pete Sacopulos said. "Then we make a hard right turn from the current process."

All sanctions issued by the Authority will be submitted to the FTC. The defendant can apply to the FTC to have the case reviewed by an administrative law judge, who will conduct a second hearing and issue a decision.

"If there is an appeal of the administrative law judge's decision, the FTC can hear the matter or not hear the matter," Sacopulos said. "If the FTC doesn't hear the matter, the next step is the U.S. Court of Appeals. From a practitioner's standpoint, the landscape is very, very different and that's a real concern."

Foreman disagreed. "While USADA will certainly oversee the disciplinary process to ensure uniformity and fairness, I believe most violations will be resolved administratively as is done in human sports overseen by USADA. It's most likely that USADA will grab only the more serious doping related cases."

Lasix

When HISA goes into effect, all medications will be prohibited for use within 48 hours of a race, including Lasix. State Racing Commissions can submit a request for an exemption on Lasix, but that exemption will not apply to two-year-olds or to stakes races.

The Authority will create an advisory committee to conduct a study on the use of Lasix in racehorses during the 48-hour period before post time of a race. The committee will be tasked with submitting a report to the Authority no later than three years after HISA is implemented.

The Authority will review the report, but it will take a unanimous vote of the nine-member Board to amend HISA rules to allow the administration of Lasix less than 48 hours before a race. In order to vote to amend the rules, the Board must determine that the modification is warranted, that it is in the best interest of horse racing, and that Lasix has no performance-enhancing effect on the horse.

As Bennett Liebman said, “Unless Rick Violette [the late president of the THA and staunch supporter of Lasix] is somehow resurrected, Lasix is gone in this country.”

Lawsuits

A second panel at the Racing and Gaming Conference at Saratoga examined the two lawsuits that have been filed to block the enactment of HISA, one led by the United States Trotting Association and state regulators in Louisiana, Oklahoma, and West Virginia, and the other filed by the National Horsemen's Benevolent and Protective Association. Motions to dismiss these lawsuits have been filed on behalf of the Board of the Authority and other defendants.



Chris Kannady, attorney for Foshee & Yaffe Law Firm, and a State Representative for Oklahoma, was the lone member of the panel discussing the legal challenges.

“It’s the little guys who are trying to fight the fight,” Kannady said. “The big states, the big power players are trying to take control of the situation. But it’s a state’s rights issue, and it could go to the U.S. Supreme Court. If HISA goes into effect, you will see litigation going on for years.”

He added, “It’s probably unlikely to go into effect, given the circumstances politically and legally.”

Ed Martin cautioned, “The industry would have to pay for a long and protracted fight if HISA is ultimately upheld. If the challenges are seriously heard, the Authority should get together with the challengers to see if there is some common ground.”

Chairman Scheeler indicated a willingness to collaborate. “We need a culture in this industry which buys into this new program. We have to make a convincing case that cooperation and compliance with this new initiative will make the sport more popular and sustainable by making it safer in the future.”