



Ohio Harness Horsemen's Association
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Re.: H.R. 1754 and S.B. 4547 Horseracing Integrity and Safety Act

October 7, 2020

The OHHA is first and foremost an advocate for the equine athlete and a proponent of reasonable regulation for the health, safety, and welfare of our equine athletes, and participants, public confidence in wagering, and the integrity of the sport. The mission of the Ohio Harness Horsemen's Association is to preserve, protect, promote and serve the entire Standardbred industry in Ohio and beyond.

For the sixth year running, Ohio is the number one standardbred racing jurisdiction in the United States. Ohio has more registered Standardbred Stallions (110) standing at 51 farm locations statewide in 37 of Ohio's 88 Counties. Ohio has produced more standardbred yearlings and registered more standardbred racehorse owners yearly than any other State. Ohio's four pari-mutuel racetracks and sixty-seven racing fair locations race live on over 600 live days with 8,500 statewide races, and 60,000 standardbred starts in a year. Ohio's standardbred racing is unmatched nationwide. H.R. 1754 and S.B. 4547 (HISA or, the Bills) will have an impact on not only the health and longevity of our standardbred partners, but also on our agricultural business spread statewide. If enacted there will be no reason for racing or the Ohio State Racing Commission. If passed, HISA will decimate Ohio's standardbred racing business.

The OHHA opposes H.R. 1754 and S.B. 4547. The Bills provide more oversight and regulation than any white collar, securities, or governmental regulatory and enforcement program in place at the federal level. The Bills provide for Federal regulation of medication and testing forcing privatization of that process at the federal level with United States Anti-Doping Agency for the first professional sport in the United States. The NBA, MLB, NFL, and NHL all administer, regulate and enforce their own anti-doping programs. Motocross, professional boxing, and UFC mixed martial arts have voluntarily opted-into the USADA. The USADA Program is and has always been limited to human athletes. The Bills provide for a limitless, discretionary, undefined, and unfunded program. The framework provided in the text is extensive, it is not possible to quantify the underlying basis for implementation as being rational for any purpose except extinction, due to the costs it will directly add to racing's participants. Widespread modification in this form will have an impact on not only the health and longevity of our standardbred partners, but also on our agricultural business spread statewide. There are serious and significant concerns about the legality, regulation, enforcement, and the Bills' intent.

A. The Bills run afoul of several well settled federal legal principles, the three most egregious follow.

1. Non-Delegation Powers: Congress cannot delegate their power to legislate to anyone else. The Bills delegate powers of regulation and enforcement on behalf of the Federal Government to a private non-profit organization (the "Authority"). Where they do not delegate those powers to the Authority, they delegate those powers back to the State Racing Commissions.

2. Commandeering States and State Agencies: The Tenth Amendment prohibits the Federal Government from issuing directives or requiring States to address specific problems by commanding the State or Officers of the State to administer or enforce a federal regulatory program. The Bills do both. They mandate participation at the federal level or give the State the opportunity to regulate only in specific cases, then commandeer the State's regulatory and enforcement program and nullify state law.

3. Violation of the Doctrine of State's Rights: HISA pre-empts state law, Section 5(a) commands, "Independent and exclusive national authority over all aspects of racing." Under the Tenth Amendment States retain rights and powers to regulate in specific subject matter areas, these are called "reserved rights". The Federal Government is not permitted to interfere with the rights reserved or implied to the States. Some of those include the death penalty, assisted suicide, same-sex marriage, gun control, cannabis and regulated gaming within their borders for those participating in that State. The Supreme Court just reaffirmed the regulated gaming protection in 2018, by invalidating the Professional and Amateur Sports Protection Act and clarifying that States Rights extend to gaming within their borders. After invalidation of PASPA States are free to enact, regulate, and enforce sports wagering within their borders free from interference from the Federal Government. The only time the Federal Government can regulate is when sports wagers cross state lines. That regulation across state lines into "interstate commerce" is what gives the Federal

Government the right to regulate. In racing the portion of gaming that crosses state lines is simulcast wagering and advance deposit wagering (ADW). The existing Interstate Horseracing Act provides the framework and guidelines for processes that must be in place to ensure all business conducted within the interstate commerce market is fair.

B. In addition to legal issues there are serious and significant concerns about regulation, enforcement, and intent of the Bills.

1. H.R. 1754 and S.B. 4547 adds a second layer of civil regulation that essentially mimics the current civil regulation in place at the State with Racing Commissions. HISA does not further the optic being pushed of providing Federal level enforcement powers. HISA does not provide for any criminal investigation or enforcement. Ultimately HISA may twilight turning everything over to Interstate Compacts, if in existence.

The Bills provide for the same enforcement powers that currently exist at the State level for regulation, which includes only civil enforcement of regulations. The Bills provide only civil subpoena powers and civil investigatory authority, with civil sanctions as a penalty. Penalty provisions provide for participants suspensions (up to a lifetime), purse payback, monetary fines, and finish placing disqualifications.

The Federal regulation of medication and testing forcing privatization of that process at the federal level with United States Anti-Doping Agency **may (or may not)** be handled by the USADA. If the USADA is not ultimately the Agency that provides medication and testing HISA can delegate that to another similar organization or commandeer the State Racing Commissions for that purpose. Commandeering the State Racing Commission will require the State Racing Commission to cede any regulation or enforcement powers granted by the State to the Authority.

The Federal Trade Commission **may (or may not)** be an Agency that plays a part in regulation and enforcement for the Authority. If the Federal Trade Commission is not ultimately the Agency that provides rulemaking and authority HISA commandeers the State Racing Commissions for that purpose. Commandeering the State Racing Commission will require the State Racing Commission to cede any regulation or enforcement powers granted by the State to the Authority. The Federal Trade Commission is only definitively the Agency tasked for enforcement over the sale of horses in interstate commerce in specific cases. The FTC will exercise enforcement for horses sold, if the horse was administered bisphosphate before turning four years old or the horse has been administered any other substance or method that has a degradation effect on a horse before it is sold.

For federal level criminal enforcement, the Department of Justice, the Federal Bureau of Investigation, Drug Enforcement Agency, and the Food and Drug Administration would not only need to be included in the legislation, but the Bills must also provide for criminal investigation techniques (i.e., prospective wiretaps), criminal penalties, and criminal sanctions like jail time. Adding criminal regulatory and enforcement mechanisms for the Authority invokes other constitutional challenges and this process would require amendments to the legislation and add significantly to the costs, which are already excessive.

2. H.R. 1754 and S.B. 4547 has an expansive list of individuals that are taxed, must register with the Authority and are regulated under HISA as a “Covered Person”. HISA does not include all parties that benefit, earn money, or derive revenue from horse racing, including those that earn the most money in interstate commerce and have had no ill effects from the COVID-19 emergency, the Advance Deposit Wagering Companies.

HISA includes trainers, owners, breeders, jockeys, racetracks, veterinarians, persons (legal and natural, which extends to business entities). It also includes anyone licensed by a state racing commission and any agents, assigns, and employees of any licensee. Registration extends to those listed and “other horse support personnel”. The expansive definition at a minimum includes veterinarians, blacksmiths, equine dentists, equine therapists, grooms, and owners.

Although racetracks are included as licensed and regulated, advance deposit wagering (ADW) companies are not included in the racetrack definition. ADW’s are also not licensed in every racing jurisdiction, a significant portion are not licensed in any jurisdiction. As a matter of fact, ADW’s earn significantly more money in interstate commerce on wagers than racetracks or horsemen do combined in interstate commerce. ADW’s purchase the right to offer wagering on live horse races to anyone subscribed to or wagering on their platform. Some ADW’s are illegal and pirate or retransmit that signal for their own pecuniary gain.

In the legal market an ADW wager is sold at a high average rate of five percent of that wager’s takeout. The takeout host fee of five percent is split between the racetrack sending the signal and the horsemen providing the product. Ninety-five percent of the takeout is retained by the ADW provider, who is often in a multijurisdictional hub State being taxed only on their handle through that hub location. If the ADW home location is not within the United States they are taxed, offshore out-of-reach of any U.S. federal or state taxation scheme, or not at all if they operating illegally. ADW’s are taking the bulk of all wagers in Interstate Commerce and are completely omitted from the legislation.

In 2019 Oregon’s reported handle on ADW was \$4,364,756,572.00. 2020 reported handle in the first six months is on pace to dwarf 2019’s total with \$2,974,813,197.39 wagered. ADW’s Churchill Downs Technology Initiatives
H.R. 1754 and S.B. 4547 Commentary

Company (d.b.a. TwinSpires), Xpressbet, LLC, and ODS Technologies, LP (d.b.a. TVG) are three of the largest that hub through Oregon's multijurisdictional hub. The entity making the most money conducting business at the highest level in interstate commerce, contributing the least money to support the product, and in taxes, is completely omitted from HISA regulation and share no portion of any expense for HISA. That provides the penultimate example of "special interest legislation", when HISA's primary Bill Sponsor is Kentucky based Senator McConnell who has been heavily funded in his home state by Churchill Downs and their myriad of subsidiary and affiliated entities.

3. H.R. 1754 and S.B. 4547 lack important term of art definitions, provide for an overly expansive definition of a "covered horse", and "covered person", and significantly alter what will constitute a violation for a covered person beyond performance enhancement and the current absolute insurer, strict liability rule by using "affect" versus "effect" on performance. HISA is not a regulation that is reasonably related to level the playing field, ensure public confidence in wagering, and the integrity of the sport. HISA applies a no fault, automatic standard that will alter the absolute insurer, strict liability rule to Absolute Liability. With an Absolute Liability standard, a "covered person" with a "covered horse" will be liable, intent and mistake do not matter or mitigate in defense.

HISA does not define injured, unsound, medications, substances, other substances, other foreign substances, or methods that **effect** performance.

A **covered horse** is defined as a horse from the time of their first timed and reported work at a training center or racetrack until the Authority is officially notified of the horse being retired.

A **covered person** is a trainer, owner, breeder, jockey, racetrack, veterinarian, and person (whether legal and natural) licensed by a racing commission, and their agents, assigns, employees, and other horse support personnel. As a condition to race, covered persons must register with the Authority. Registering subjects a covered person to all rules and compels cooperation with the Authority at all times and for all purposes.

Medication and testing violations for a covered person are, (1) attempted use, (2) possession, (3) attempted possession, (4) administration or attempted administration, (5) refusing to submit a horse for sample collection "without compelling justification" (undefined), (6) failure to cooperate with the Authority or an Authority Agent during an investigation, and (7) failure to respond truthfully with respect to any matter under the Authority's jurisdiction, (8) tampering or attempted tampering, (9) intentional interference or attempt to interfere, (10) obtaining or providing fraudulent information, (11) intimidation or attempt to intimidate a witness, (12) trafficking or attempted trafficking, (13) assisting, encouraging, aiding, abetting, conspiring, covering up or **(14) any other type of intentional complicity involving safety, performance, anti-doping, medication control, rule violation, or violation of a period of suspension or eligibility.**

Modifies "performance enhancement" to a requirement that horses be raced free from the influence of medications, other foreign substances, and methods that **affect performance**. The use of the word "affect" means any of these things **will** impact or change the horse's performance, good, bad, or indifferent. This is beyond a strict liability basis.

The medication and testing infraction change is significant. Under the current absolute insurer, strict liability standard, a trainer is strictly liability for performance enhancement, which gave a horse an unfair advantage, resulting in an unlevel playing field for that horse, to the detriment of the public wagering on that race.

HISA expands medication and testing violations to include any "**method**" in addition to medications, other substances, or methods that affect performance. There is no burden on the regulatory body to prove performance enhancement and an unfair advantage to the detriment of the public wagering on that race.

It is a stricter and more stringent standard than the current, Absolute Trainer Responsibility and Strict Liability common law state rule in existence nationwide now.

Without the cause and **effect** of a positive test resulting in an unfair advantage leading to public deception, the new HISA standard of **affect** is likely another basis for legal challenge. HISA is not a regulation that is reasonably related to level the playing field, ensure public confidence in wagering, and the integrity of the sport. HISA applies a fact-based standard that will alter the absolute insurer/strict liability rule to Absolute Liability. Absolute liability standards are typically put in place for crimes. A crime that arises to such a level that the overriding benefit to the community outweighs any potential negative impact on an accused person. Absolute liability is applied to things that are inherently dangerous and create an undue risk despite all reasonable precautions. With HISA a "covered person" will be liable, intent and mistake do not matter or mitigate for defense and punishment. Mitigation is very narrow in anti-doping and medication control rule cases and is only permitted under the Protocol for Olympic Movement Testing for the United States Anti-Doping Agency rules.

4. H.R. 1754 and S.B. 4547 funding is set by the “Authority” itself. Not only does the Authority give themselves a blank check for funding and fees for registering “covered persons”, they also have complete authority to take out loans that must be paid back pro-rata by each State Racing Commission on a yearly basis. In Ohio, outside of the administrative costs, the statewide horsemen’s purse pools pay for the costs and expenses of the statewide medication and testing program.

The blank check for funding is calculated on a per-race starts in each state basis and based upon the total amount of money the authority needs to function nationwide yearly. There is no estimate on base funding for the plan as proposed included in the legislation or any of the accompanying historical documents.

Ohio will be taxed disproportionately for being a successful racing state. Covered persons will be assessed a fee by the Authority. Covered persons racing at different racetracks in a state will be taxed disproportionately. The per-start fee will be proportionally larger for covered persons at Hollywood Dayton and MGM Northfield, which have lower purses than Miami Valley Gaming or Eldorado Scioto. Consequently, the cost pro-rata will be lower at the higher level racetracks. That disproportionate share will operate to a deficit the smaller covered person and lower purse racetracks nationwide, not just in Ohio. The Ohio State Racing Commission will also be assessed for the program’s costs. Racing Commissions will be billed by November 1st each year per-start, plus a pro-rata share of loan repayment based upon the same per-start formula. Although there is a provision contained in the legislation for a breed other than thoroughbreds to opt-out of the legislation, there is a gray area of interpretation on the funding that must be paid by Racing Commissions each year. One view is State Racing Commissions that opt-out can also opt-out of the pro-rata funding schematic as well. However, the Bills can also be read that opting out of HRIS does not relieve any State Racing Commission from their pro-rata share of the per-start fees or federal costs of loans. All loans go to the Authority. Any income, which includes fees, fines, and loan repayments go back to the Authority. There is no opportunity for Racing Commissions to receive any money from the Authority to offset any costs related to HISA, all funds flow to the Authority only.

The costs and expenses of the program have begun with the announcement on October 7, 2020 of the Nominating Committee for the Authority. Without authority for hire via passage on the legislation, the meter has commenced on the liability ledger for the Authority.

5. H.R. 1754 and S.B. 4547 by majority rule require all governing body and committee members be “Independent”, disinterested members that have no knowledge of or about horses, even to the point of expansion to prohibit members that have a connection to horses through a commercial or familial relationship. The Bills say the initial Members of the Committee are named in the Governing Documents. The Initial Nominating Committee was named prior to passage of the Bills on October 7, 2020.

Independent members are expansively defined as individuals that (1) do not have a financial interest in horses, (2) do not provide goods and services for horses, (3) are not an officer or official in the equine industry, (4) do not act in an equine governing or policymaking role, (5) are not an industry representative, and (6) cannot be an employee or immediate family member or (6) be in a commercial relationship with anyone in the first three categories (1-3). In plain English, Independent members hold a majority seat on the Board or Committees at every level in the Authority, including Chairs for the Committees, and will have no knowledge about horses.

Nominating Committee announced October 7, 2020 comprised of seven members from outside the industry. The initial Members are to be named in the governing documents. With the announcement pre-legislative enactment, the governing documents must be complete. Nominating Committee Members select the Nine Member Board, future vacancies on the Nominating Committee are filled by the Nine Member Board. Clear and direct conflict at inception.

Nine Member Board. Chair and four members are from outside the equine industry with no connection to the equine industry, three members from various equine constituencies and not more than one from any constituency.

Seven Member Anti-Doping Medication Control Committee, develops and maintains the Anti-doping Medication and Control Committee. The Chairman is one of four Members that must be independent, disinterested parties. Three are equine constituents that have experience in anti-doping and medication control rules, with no more than one from any equine discipline.

Seven Member Racetrack Safety Committee- develops and maintains the racetrack safety program. Four Members must be independent, disinterested parties. The Chairman is one of three Members that are equine constituents and have experience in anti-doping and medication control rules, with no more than one from any equine discipline.

6. H.R. 1754 and S.B. 4547 require horses be raced free from the influence of medications, other foreign substances, and methods. HISA anti-doping rules go into effect for horses racing 48 hours from enactment. In plain language, upon passage, from 48 hours to race date, a horse will race without medication or any substance administered. Although a state racing commission can opt-out of the Lasix prohibition for overnight racehorses, 3 years-old and up, the opt-out can only be extended after a unanimous decision by the Authority on four findings of

fact under a non-existent and yet to be commissioned study that finds; reversing the prohibition is warranted, Lasix has no performance enhancing effect, it is in the best interest of racing, and will not adversely affect the public's perception of integrity and safety.

48 Hours after the effective date horses will not be permitted to race with Lasix. The Authority permits opt-out of this by State Racing Commissions for the use of Lasix only in non-stakes races for horses 3 years-old and over. However, opt-out expires in three years if and only if a three-year study commissioned by the Authority results in a unanimous decision to continue that after considering the following factors, (1) a change in circumstance warrants change, (2) it is in the best interests of racing, (3) Lasix has no performance enhancing effect on individual racehorses, (4) the public's perception of integrity and safety would not be adversely effected if modified.

48 Hours after the effective date, the baseline rules for lists of permitted and prohibited substances will be selected from the strictest provision found in the, (1) International Federation of Horseracing Authorities screening limits for urine May 2019, (2) International Federation of Horseracing Authorities International screening limits for plasma May 2019, or (3) World Anti-doping Agency International Standards for Labs from 11/12/2019, or (4) ARCI Model Rules v.9.2 or ARCI Penalty Model Rules of Racing v.6.2.

Within 6 months of the effective date the lab accreditation standards will be put in place along with standards and protocols for testing samples. Provisional Lab Accreditation is automatic for labs that are already accredited by the Racing Medication and Testing Consortium. Racing Commissions can designate any provisionally accredited lab, if they do not select a lab, the Authority will choose one for them.

Veterinarians are required to provide full disclosure to the Authority and Racing Commissions for administration of anything to a covered horse. Therapeutic medications are limited to, "the minimum necessary to address the diagnosed health concerns identified during the examination and diagnostic process". Veterinarians are to ignore their professional training and manufacturer's instructions and recommended dosage. The International Federation of Horseracing Authorities and the Principles of Veterinary Medical Ethics of the American Veterinary Medication Association are the basis for anti-doping medication control standards.

Veterinarians are required to go through a "review process" with the Authority for administration of any medication 48 hours prior to a race.

HISA permits In Competition and Out of Competition Testing without any advance notice. This is a clear and direct violation of Ohio Law. The authority extends to, "race day"¹ medication and testing in Ohio and prohibits a horse *entered to race* from having any prohibited "*foreign substance*" **on race day**.² The Ohio Legislature has not granted authority for medication and testing regulation or enforcement outside of this very specific race day framework.

7. H.R. 1754 and S.B. 4547 establishes the racetrack safety program devoid of Standardbred breed, racetracks, racetrack surfaces, and baseline information input or consideration.

Input comes from the National Thoroughbred Racing Association Safety and Integrity Alliance Code of Standards, The International Federation of Horseracing Authority's International Agreement on Breeding, Racing, and Wagering, and the British Horseracing Authority's Equine Health and Welfare Program.

Safety Program will develop; list of standards and protocols for the humane treatment of horses, racing surface quality maintenance system, rules governing oversight and movement of covered horses, nationwide injury and fatality data analysis, investigations for safety procedures.

Covered person (due to being registered) is required to provide any items requested for the purpose of increased racehorse welfare.

Thank you for your time and attention to this important matter. Please do not hesitate to reach out with any questions.

Sincerely,



Renée Mancino
Executive Director

¹ R.C. 3769.082(E) and 3769.01, "race day" is, the twenty-four-hour period beginning at one minute after twelve a.m. and ending at twelve midnight of a day when horse racing is scheduled".

² R.C. 3769-18-01 & 18-02. Foreign substances include all classified substances except those that exist naturally in an untreated horse at normal physiological concentrations and include all narcotics, stimulants, depressants, or other drugs.