

Congress of the United States
Washington, DC 20510

January 25, 2023

The Honorable Lina M. Khan, Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairwoman Khan:

We write to strongly urge the Federal Trade Commission (“FTC”) to disapprove the Horseracing Integrity and Safety Act (“HISA” or “Act”) proposed Anti-Doping and Medication Control Program Rule (“Rule”) that the Horseracing Integrity and Safety Authority, Inc. (the “Authority”) reportedly resubmitted to you between December 29, 2022 and January 5, 2023.¹ We also recommend you issue a statement clarifying that the Racetrack Safety Rule, which was approved by the FTC on March 3, 2022, is invalid and will not be enforced pending the outcome of ongoing litigation.

To avoid continued industry-wide confusion and potential inequitable enforcement, it is imperative that you again disapprove the proposed Rule until after the constitutionality of HISA has been resolved. Furthermore, you should issue a statement clarifying that, as a result of provisions Congress included in the Consolidated Appropriations Act of 2023, previously-submitted rules are now invalid and, following the resolution of the litigation, must be resubmitted for consideration by the FTC. We strongly encourage the FTC not to publish any proposed rules submitted by the Authority in the Federal Register until the constitutional issue has been resolved fully.

As you know, on November 18, 2022, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit unanimously ruled HISA unconstitutional.² The Court found that HISA violated the private non-delegation doctrine because the Act gave the FTC insufficient authority over a private corporation.³ As a result, on December 12, 2022, you disapproved the Authority’s proposed Rule until, “the legal uncertainty regarding the Act’s constitutionality comes to be

¹ Ray Paulick, *Lazarus Optimistic About HISA’s Future, Hopeful for Mid-March Launch of Anti-Doping and Medication Control Program* Report, Jan. 5, 2023, <https://paulickreport.com/news/the-biz/lazarus-optimistic-about-hisas-future-hopeful-for-mid-march-launch-of-anti-doping-and-medication-control-program/>.

² See, *Nat’l Horsemen’s Benevolent and Protective Assn., et al. v. Black, et al.*, 53 F.4th 869 (5th Cir. 2022), <https://www.ca5.uscourts.gov/opinions/pub/22/22-10387-CV0.pdf>.

³ *Id.* at 889-890.

resolved.”⁴ On December 29, 2022, President Biden signed the Consolidated Appropriations Act of 2023, which included, over the objections of many Members of Congress, language that the Authority claims is a “fix” to HISA’s constitutionality defects. But this action has left the industry in even more legal uncertainty.


Court filings in the four lawsuits challenging HISA have made clear that HISA’s future is far from certain. It would be irresponsible for the FTC to move forward to approve the Authority’s Rule now, as the courts have not even had an opportunity to weigh in on the new so-called legislative “fix.” The legal issues likely will not be resolved until multiple Circuit Courts—and potentially, the Supreme Court—have had a chance to weigh in. Prior to that, the FTC should not grant the Authority’s request to rush to approve this Rule, which the Authority failed to submit to the FTC before July 1, 2022, as required by the statute.

Additionally, while the Authority purports that the section of the Consolidated Appropriations Act of 2023 resolves the constitutional flaws with the Authority, it was never debated or otherwise considered by Congress until it was unveiled as part of this end-of-year package, and we submit it effectively affirms the Fifth Circuit’s conclusion that the Authority is unconstitutional. While we take no position at this time as to the effect of this legislative change to the Authority, it is clear that Congress has acknowledged the Authority, in its previous structure, was unconstitutional. As a result, any previously-approved rules submitted by the Authority to the FTC are unconstitutional, and we strongly encourage the FTC to issue a statement confirming these rules, apart from any court orders governing these rules, are unconstitutional, invalid, and unenforceable at this time.

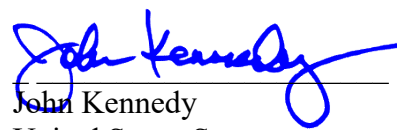
In closing, we strongly urge you to refrain from publishing or approving the Authority’s proposed Rule while legal uncertainty remains. Thank you for your attention to this important matter. Please do not hesitate to contact our offices if you require any further information.

Sincerely,



Charles E. Grassley
United States Senator


Joe Manchin III
United States Senator

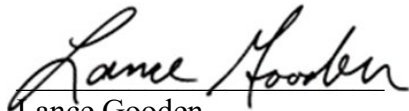

Ted Cruz
United States Senator


John Kennedy
United States Senator

⁴ Fed. Trade Comm’n, *Order Disapproving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority*, Dec. 12, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/order_re_hisa_anti-doping_disapprove_without_prejudice_0.pdf.



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United States Senator




Lance Gooden
Member of Congress



Jake Ellzey
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