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FEDERAL TRADE COMMISSION

Horseracing Integrity and Safety Act: Anti-Doping and Medication Control Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of Horseracing Integrity and Safety Authority (HISA) final rule; delay of effectiveness.

SUMMARY: The Federal Trade Commission modifies the Horseracing Integrity and Safety Authority's Anti-Doping and Medication Control Rule by extending its date of effectiveness until May 22, 2023.

DATES: As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the date of effectiveness for the Horseracing Integrity and Safety Authority's Anti-Doping and Medication Control Rule is delayed to May 22, 2023.

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SUPPLEMENTARY INFORMATION:

I. Reason for Delay of HISA's Final Rule

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. 3051–3060 ("Act"), tasks a self-regulatory nonprofit organization, the Horseracing Integrity and Safety Authority ("Authority"), with developing proposed rules on a variety of subjects. *See* 15 U.S.C. 3053(a). Those proposed rules take effect only if approved by the Federal Trade Commission, *see* 15 U.S.C. 3053(b)(2), which must approve the proposed rules if it finds that they are consistent with the Act and with applicable rules approved by the Commission, *see* 15 U.S.C. 3053(c)(2). The Commission, however, may by rule abrogate, add to, or modify the Authority's rules "as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority" to the Act's requirements or applicable rules approved by the

Commission, "or otherwise in furtherance of the purposes of this Act." *Id.* sec. 3053(e).

On March 27, 2023, the Commission issued an Order ("Order") approving the Authority's proposed Anti-Doping and Medication Control ("ADMC") Rule. Pursuant to that Order, the ADMC Rule took effect immediately upon the Commission's approval, *i.e.*, on March 27, 2023.[1]

On March 31, 2023, however, the United States District Court for the Northern District of Texas determined that the Commission had violated the Administrative Procedure Act by declaring the ADMC Rule effective immediately upon the issuance of the Commission's Order approving the Rule. Viewing the Commission's March 27 Order as tantamount to an agency's issuance of a substantive rule, the court found that the Commission should have delayed the date of effectiveness for the ADMC Rule for 30 days following approval. The court accordingly enjoined implementation or enforcement of the ADMC Rule until May 1, 2023.[2]

The district court's March 31 order has given rise to substantial uncertainty regarding the criteria and procedures under which anti-doping and medication control protocols will be implemented as the Thoroughbred horseracing industry nears the Triple Crown events of May 6 (Kentucky Derby), May 20 (Preakness Stakes), and June 10 (Belmont Stakes). With the date of effectiveness for the Authority's nationally applicable ADMC Rule suspended by the district court until May 1, the conduct of anti-doping and medication control will remain under the jurisdiction of the various state racing authorities until that date, with the Authority's jurisdiction resuming only five days before the Kentucky Derby and nineteen days before the Preakness. Because the ADMC Rule governs the treatment of horses weeks before a covered race, some affected parties who are treating horses in a manner consistent with state requirements may find it difficult to come into compliance in the five days between the ADMC Rule's scheduled date of

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[1] *See* Fed. Trade Comm'n, Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity & Safety Auth. (Mar. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P222100CommissionOrderAntiDopingMedication.pdf.

[2] *Nat'l Horsemen's Benevolent & Protective Ass'n et al. v. Jerry Black et al.*, No. 5:21-CV-071-H, 2023 WL 2753978 (N.D. Tex. Mar. 31, 2023).

effectiveness and the Kentucky Derby on May 6.[3] Even in the absence of conflicts between the ADMC Rule and applicable state regulations, implementing new testing requirements just days before the start of the Triple Crown creates an appreciable risk of errors, confusion, and inconsistent treatment of similarly situated horses – harms that could frustrate the purposes of the Act.

In light of these policy concerns, the Commission finds it necessary to modify HISA's ADMC Rule, pursuant to the recently revised 15 U.S.C. 3053(e), to ensure the "fair administration of the Authority" and otherwise in furtherance of the Act's purposes. Accordingly, pursuant to the authority granted to the Commission by 15 U.S.C. 3053(e), the Commission issues this document delaying the date of effectiveness for the Horseracing Integrity and Safety Authority's Anti-Doping and Medication Control Rule until May 22, 2023.

II. Administrative Procedure Act

As noted above, the Act authorizes the Commission to abrogate, add to, or modify the Authority's rules for specified reasons, including "to ensure the fair administration of the Authority." 15 U.S.C. 3053(e). This provision authorizes Commission rulemaking pursuant to section 553 of Title 5, the Administrative Procedure Act (APA). The APA typically provides for notice-and-comment rulemaking, but under section 553(b)(3)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an "agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[4]

Here, the Commission finds, for good cause, that notice and comment is impracticable

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[3] *Compare*, *e.g.*, ADMC Rule 4222 (prohibiting all intra-articular injections within fourteen days of post time) *with* Kentucky Horse Racing Commission Withdrawal Guidelines:
Thoroughbred; Standardbred; Quarter Horse, Appaloosa, and Arabian, KHRC 8-020-2 (04/2020) (prohibiting intra-articular injection of specified substances within fourteen days of post time), *available at* https://khrc.ky.gov/Documents/8-020-2-Withdrawal%20Guidelines%20%20Copy.pdf.

[4] 5 U.S.C. 553(b)(3)(B).

and unnecessary with respect to the document. Given the short time remaining before commencement of the Triple Crown races, providing advance notice would delay the effect of HISA's final rule until after the Kentucky Derby, defeating the rule's purpose. Obtaining comments after issuance of the rule is unnecessary because the full effect of the Commission's rule – which merely provides for a brief delay in the date of effectiveness for the ADMC Rule – will have occurred prior to the Commission's collection and consideration of any comments.

For these reasons, the Commission finds that there is good cause consistent with the public interest to issue the document without notice and comment.[5] The Commission therefore issues the document without prior notice and comment.

The APA also requires a 30-day delayed effective date, except for "(1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause."[6] For the same reasons noted with regard to notice and comment, and because extending the date of effectiveness for the ADMC Rule relieves a restriction, the Commission finds there is good cause for its document to take effect immediately.

III. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (PRA), an agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget control number. This document issued by the Commission – which addresses solely the date of effectiveness for the Authority's ADMC Rule – does not involve any collection of information pursuant to the PRA.

IV. Regulatory Flexibility Act and Congressional Review Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires that the Commission

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[5] *Id*.
[6] *Id*. at 553(d).

provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule and a Final Regulatory Flexibility Analysis (FRFA), if any, with a final rule. However, this obligation does not apply when an agency for good cause determines that a rulemaking is not subject to notice and comment. *See, e.g.*, *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1123-24 (9th Cir. 2006). The Commission finds that good cause exists for adopting this document without advance public notice or an opportunity for public comment. Because notice and comment are not statutorily required, the requirement to publish an analysis under the RFA does not apply to this document.

Pursuant to the Congressional Review Act (5 U.S.C. 801 through 808), the Office of Information and Regulatory Affairs has said that it would presumptively treat the type of rulemaking that the Commission announces today as not a "major rule" (as defined in 5 U.S.C. 804(2)). The Commission occasionally extends a compliance date for a new rule or rule amendment to give entities additional time to prepare for compliance. For example, in 2010, the FTC extended the compliance date for its Energy Labeling Rule (16 CFR part 305) (formerly, Appliance Labeling Rule) to give regulated entities additional time to incorporate new labeling requirements for light bulbs into product packaging. *See* 75 FR 81943 (Dec. 29, 2010); 76 FR 20233 (Apr. 12, 2011). The Office of Management and Budget has previously designated such extensions as "not major." Because such amendments merely defer the expected economic effects of a previously adopted rule, any costs and benefits associated with the compliance date extension should be incremental to those already considered in connection with the promulgation of the underlying rule. For similar reasons, the relief should not result in major cost increases or significant adverse effects on competition, investment, or innovation. In addition, for purposes of this category, presumptively "not major" rules would be those in which the compliance date extension is limited to not more than one year, which will further serve to limit the economic impact of such extensions. The three-week extension of the ADMC Rule's date of effectiveness satisfies this criterion.

For the reasons stated above, the Federal Trade Commission extends the date of

effectiveness for the Horseracing Integrity and Safety Authority's Anti-Doping and Medication Control Rule to May 22, 2023.

By direction of the Commission.

April J. Tabor,

Secretary.

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