RESPONSE TO PUBLIC COMMENTS
178 CSR 1 THOROUGHBRED RACING

The West Virginia Racing Commission received public comments from Hollywood Casino at Charles Town Races (HCCTR), the Charles Town Horsemen's Benevolent and Protective Association (CTHBPA), the North American Association of Racetrack Veterinarians (NAARV), the National HBPA, the Mountaineer Park HBPA, and the Jockeys' Guild. The public comments addressed the following rules/topics, to which the West Virginia Racing Commission responds:

1. Wagering prohibition

The Racing Commission proposes to amend its rule to prohibit permit holders directly involved in managing racetrack operations from wagering on races under the jurisdiction of the Commission. *See* proposed rule § 20.3. Currently, the rule prohibits designated racing officials from wagering on races under the jurisdiction of the Commission. *See* § 7.4.d.

The CTHBPA commented in support of prohibiting track management from wagering, but commented that the Commission should let track management wager on races at another licensed racetrack in West Virginia, *i.e.*, allow track management at Charles Town to wager on races at Mountaineer and vice versa. HCCTR commented in support of the track management prohibition, but commented that it should be expanded to all track employees, Commission members and Commission employees.

In response to these comments, the Commission determined to expand the wagering prohibition to Commission members and employees, but to leave the proposed rule as is with regard to the prohibition on track management permit holders. Therefore, the Commission left the proposed language in § 20.3. as is, but added additional language at proposed rule § 3.4. to expand the prohibition to Commission members and employees.

The Commission determined that a broader prohibition to all track employees is not necessary to protect the integrity of racing. Rank and file track employees (other than those who are banned from wagering as racing officials under § 7.4.d. of the rule), generally have no influence over the running of races at the racetrack. The Commission also determined to leave the prohibition on wagering for track management for all races under the jurisdiction of the Commission inasmuch as many trainers/owners/horses that are West Virginia permit holders travel back and forth and race horses at both tracks. The Commission determined that it could result in an impropriety or an appearance thereof, if track management permit holders can wager on West Virginia permit holders who routinely race at their racetracks on any given day and then turn around and wager on races involving the same permit holders at a competing West Virginia racetracks.

2. Transfer of horses

The Commission proposed to amend § 26.3.o. of the rule to stop the transfer of horses from a trainer whose permit is suspended for racing rule violations to certain delineated employees and family members as a means to address the ongoing problem of "program trainers" on West

Virginia's racetracks. "Program trainers" are trainers who train and race horses as a "front" for suspended trainers. The purpose of prohibiting such transfers is to prevent the suspended trainer from benefitting financially from the horses he/she formerly trained while the trainer is serving a suspension of his/her permit. The proposed non-transfer language would apply to a logical subset of people who are most likely to front for a suspended trainer.

HCCTR commented in favor of this amendment, while the CTHBPA commented in opposition to this amendment. The CTHBPA commented that the rule violates due process. While the Commission does not believe that the rule has any constitutional infirmities, it nonetheless decided to take this language out of its proposed rules for this rulemaking cycle. The concept embodied in this proposal may be revisited in future rulemaking cycles after further consideration is given.

3. Veterinary Practices

The Commission sought to adopt the Association of Racing Commissioners International (RCI) Model Rule on Veterinary Practices. *See* proposed § 48.2. The CTHBPA and NAARV commented in opposition to the adoption of this Model Rule for various reasons. The Commission decided that it would refrain from adopting this Model Rule in this rulemaking cycle and to give further consideration to the matter in future rulemaking cycles. Further consideration and study of this rule may allow the Commission to address the concerns of the commenting parties.

4. Lasix Administration

HCCTR commented that the Commission should adopt the RCI Model Rule on Lasix administration. Lasix is a medication that is given to horses to prevent exercise-induced bleeding in the lungs. Under the Thoroughbred Racing rule, it is allowed to be administered to horses on race day if certain conditions are met.

The RCI Model Rule, which has been adopted by many racing jurisdictions, dictates that veterinarians appointed by the Racing Commission are the only persons who can administer Lasix to horses on race day. Those appointed veterinarians are paid for Lasix administration by fees paid by the trainers/owners of the horses to whom the drug is administered. However, those appointed veterinarians cannot have an active practice treating horses who are competing on the racetrack. The appointed veterinarians' sole function is to work for the Racing Commission administering Lasix and to have no financial relationship/business dealings directly with trainers/owners.

The purpose of the Model Rule is to get private practice veterinarians out of the stalls of horses on race day. While many veterinarians are ethical, some are not. If given the opportunity, unethical vets will administer drugs that are not permitted on race day. For purposes of stopping this opportunity from being available and to avoid the public perception that private veterinarians are giving impermissible drugs to horses on race day, the RCI and many racing jurisdictions have adopted this Model Rule.

West Virginia looked at the adoption of this Model Rule several years ago and determined that practical considerations prevented its adoption. Instead, the Commission adopted a rule that allows private veterinarians to administer Lasix, but requires a Commission employee to have direct supervision over the administration to ensure that the veterinarian is only administering Lasix and is not administering other drugs.

The concerns that caused the Commission to adopt a Lasix administration rule other than the RCI Model Rule arose out of circumstances at Mountaineer Racetrack. Constituents at Mountaineer expressed that there are a very limited number of private practice veterinarians available to treat horses at Mountaineer. Mountaineer constituents advised against adopting the RCI Model Rule because they indicated that if the private practice veterinarians lost the Lasix treatment business to veterinarians appointed by the Commission, the private practice veterinarians would fold up and leave the racetrack. In sum, Mountaineer constituents asserted that Mountaineer would no longer have private practice veterinarians on its racetrack, if West Virginia adopted the Model Rule.

The Commission decided to refrain from adopting the RCI Model Rule on Lasix administration this year, but to revisit this rule in future rulemaking cycles. Further discussions about the adoption of this rule are warranted to determine if the practical considerations at Mountaineer Racetrack would still serve as an impediment to the adoption of this rule.

5. Trainer eligibility rule

HCCTR commented that West Virginia should adopt the RCI Model Rule on eligibility for a trainer's permit. One of the key components to the Model Rule is the requirement for a trainer to have four hours per year of continuing education in order to keep a trainer's permit.

At this point, the Racing Commission is not certain that there enough outlets for trainer continuing education in West Virginia to allow our trainers to obtain four hours training every year. This is an issue that needs more study and more development. Therefore, the Commission voted not to adopt this RCI Model Rule this year, but to further examine the feasibility of this rule for possible adoption in future rulemaking cycles.

6. Medication rules

HCCTR commented in support of the Commission's adoption of updated RCI Model rules related to medications in the form of RCI's Uniform Classification Guidelines for Foreign Substances, *see* Table 178-1 D, and RCI's Controlled Therapeutic Medication Schedule for Horses, *see* Table 178-1 F. The Commission appreciates HCCTR's favorable comments on these rules.

7. Pari-Mutuel Wagering Rule

HCCTR's comment included a proposal to amend a section of the Commission's Pari-Mutuel Wagering rule, 178 CSR 5. However, the Commission is not seeking to amend the Pari-Mutuel

Wagering during this rulemaking cycle and it was not open for public comment. Therefore, this comment cannot be considered by the Commission at this time.

8. Entry rule

HCCTR and the CTHBPA commented that an amendment is desired to § 39.3.a. of the rule related to the entry of horses with common ties through ownership and training. After communicating with the commenting parties on the desired nature of the amendment and possible language to accomplish the amendment, the Commission voted to amend § 39.3.a. as follows:

> *39.3.a. No more than two (2) horses having common ties through ownership or training may be entered in an overnight race. ~~Under no circumstances may both horses of an entry involving horses having common ties through ownership or training start to the exclusion of a single entry.~~ When horses having common ties through ownership or training are entered in an overnight race, preference by date on day of entry shall be given. Provided, however, ~~W~~when making an entry involving two (2) horses having common ties through ownership or ~~training~~, a preference for one (1) of the horses must be made and both of such horses having common ties may not start to the exclusion of a single entry.*

9. Animal cruelty

The Commission seeks to amend § 24.11.q. to allow disciplinary action against permit holders for cruelty to animals other than horses. The current rule limits action to those who are cruel to horses. This proposed amendment is sought because state veterinarians have indicated that they have been confronted with situations wherein permit holders have been cruel to other animals on the racetrack, *i.e.* companion goats and cats. General animal welfare, not just equine welfare, is a legitimate concern of the Racing Commission.

The CTHBPA commented in opposition to extending the rule to "animals" because it believes that the extension is too broad. The CTHBPA proposed an amendment that would strike some language in the Commission's proposal and add language related to allowing the Commission and the stewards to take action against a permit holder if he/she is convicted of animal cruelty in court. In response to the CTHBPA's comment, the Commission decided to adopt the proposed amendment related to conviction for animal cruelty and to narrow the rule related to "animals" to limit it to livestock or other domestic animals kept on racetrack grounds. The proposed rule language that the Commission now puts forward in response to the CTHBPA's concerns is as follows:

> *24.11.q. The Racing Commission and/or the stewards may, in their discretion, refuse to issue or renew an occupational permit to an applicant, or may in their discretion suspend, revoke, or impose other disciplinary measures upon an occupational permit issued pursuant to this rule, if the applicant or permit holder .*

. . has abandoned, mistreated, abused, neglected or engaged in an act of cruelty to a horse or any other livestock or domestic animals kept on association grounds, or has been convicted of animal cruelty in a court of competent jurisdiction.

10. Naming of riders

The CTHBPA commented in support of the Commission's proposed amendment, *see* proposed § 29.3.e., that would require the consent of a trainer before a jockey's agent can name a jockey on a horse scheduled to race. The Commission appreciates the CTHBPA's favorable comment on this amendment.

11. Universal Veterinarian's List

The Commission proposes to adopt the RCI Model Rule known as the Universal Veterinarian's List. *See* proposed §§ 41.2.g., 44.14., 44.18., 44.19 and 52.3. This rule governs the conditions upon which a horse may be put on and may be removed from the Veterinarian's List. Placement on the list means that the horse is given a hiatus for a specified time due to injury, illness or other infirmity that precludes it from being entered to race.

The CTHBPA commented favorably upon various sections of this rule, but remarked that the established seven day hiatus period in the Model Rule, should be modified by the Commission to five days. Honoring this comment, the Commission voted to modify the Model Rule to five days. *See* proposed §§ 41.2.g. and 52.3.c.

The CTHBPA also commented on proposed § 52.3.a. of the rule which requires State Veterinarians to maintain the Veterinarians' List of all horses which are determined to be unfit to compete in a race due to illness, physical distress, unsoundness, injury, infirmity, heat exhaustion, positive test or overage, administration of a medication invoking a mandatory stand down time, administration of shock wave therapy, positive out of competition test or any other assessment or determination by a State Veterinarian that a horse is unfit to race.

Specifically, the CTHBPA takes issue with the word "illness" and suggests that the rule will require a State Veterinarian to "diagnose" illness. The CTHBPA suggests that all of the possible conditions which might cause a horse to be unfit should be taken out of the rule. The Commission responds that the list of conditions is clearly not meant to be all-inclusive, but is meant to be general descriptors of conditions that a State Veterinarian may determine causes a horse to be unfit to race. The Commission's State Veterinarians are in a position to "diagnose" or make judgments about the medical conditions of horses so that a determination can be made as to whether a horse is fit to race. The Commission therefore sees no need to change the Model Rule language.

12. Out of Competition Testing

The Commission proposed to adopt the RCI Model Rule on Out of Competition Testing (OOCT) of horses and trainer responsibility rules related to OOCT. *See* proposed §§ 49.14, 51.b. through 51.1.d., proposed Table 178-1 H, RCI Prohibited List, and proposed Table 178-1 I RCI Restricted Therapeutic Use Requirements. The NHBPA, the CTHBPA, the MPHBPA and NAARV commented in opposition to the adoption of these rules for various reasons. The Commission decided that it would refrain from adopting these rules in this rulemaking cycle and to give further consideration to the matter in future rulemaking cycles. Further consideration and study of this rule may allow the Commission to address the concerns of the commenting parties. In addition, the trainer responsibility rules related to OOCT are likely to be further addressed by RCI at the national level in the future. Consideration of this aspect of OOCT is better delayed until RCI acts.

13. Horse Slaughter

Several years ago, the Racing Commission adopted a rule that allows the stewards and the Commission to take disciplinary action against a permit holder if he/she *"knowingly, or without conducting proper due diligence, sold a horse for slaughter, directly or indirectly."* *See* § 24.11.p.

This language was agreed to by all stakeholders and put West Virginia on the map as being one of the first states to make such conduct a rule violation. Since the rule was adopted, however, the stewards and the Commission have not had a circumstance in which they have exercised their authority to take action against a permit holder under this rule. Because the stewards and the Commission have not yet invoked enforcement of this rule, there is no evidence that they have construed it or enforced it some manner that is unfair, unjust or an abuse of discretion.

The CTHBPA commented on this rule and takes issue with the word "proper" in the rule. Generally, the CTHBPA comments that it does not know what "proper due diligence" is. Of course, not every word or term is specifically defined in a rule or statute. There are many, many words and terms in rules and in statutes that are not defined, *i.e.*, "arbitrary and capricious," "unqualified to perform the duties," "disturb the peace," etc., etc., etc. That is the nature of rules and of the law. In the absence of a specific definition, our courts have consistently held that regulators are required to give words their common, ordinary and customary meaning. Black's Law Dictionary defines "due diligence" as "[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable prudent man under the particular circumstances, not measured by any absolute standard, but depending upon the relative facts of the case."

In sum, there will always be words and terms that have to be construed and applied. Some regulatory judgment has to be exercised in that construction and application. Whether or not a particular standard, like "proper due diligence" or "due diligence" has been met will always entail some fact finding and some judgment to be exercised on behalf of the stewards and the Commission. That judgment must be exercised whether or not the word "proper" is in the rule. The presence or absence of that word is not significant.

Accordingly, "proper due diligence" or "due diligence" can never be perfectly or exactly defined. Nor can it be limited, as the CTHBPA proposes, to whether the seller of a horse gets something in writing from the buyer in which the buyer "promises" not to sell a horse to slaughter. Known "slaughter middlemen" or "kill buyers" can put in writing that they won't sell horses to slaughter. But, the Commission would submit that it is not reasonable for a horsemen to expect a known "kill buyer" to keep that promise when that is the business that the "kill buyer" is in. The CTHBPA's amendment in that regard is too simplistic.

In the interests of addressing the CTHBPA's concerns, however, the Commission decided to take the words "proper" and "directly" out of the rule. Also, the Commission decided to further improve the rule by giving a definition of "due diligence." The Commission believes that these modifications address the CTHBPA's concerns, while recognizing that some reasonable prosecutorial discretion on the part of the stewards and the Commission must be exercised in enforcing this rule. The following is the Commission's proposal:

> *24.11.p. The Racing Commission and/or the stewards may, in their discretion, refuse to issue or renew an occupational permit to an applicant, or may in their discretion suspend, revoke, or impose other disciplinary measures upon an occupational permit issued pursuant to this rule, if the applicant or permit holder . . . has knowingly, or without conducting ~~proper~~ due diligence, sold a horse for slaughter, ~~directly or~~ indirectly. "Due diligence" as used in this subdivision, shall mean the care and prudence that a reasonable racing permit holder should exercise to avoid selling a horse to a person or persons who may cause a horse to be conveyed for slaughter.*

14. Permit holder drug testing

The Jockeys' Guild commented to request that the Commission make amendments to its existing rule related to the drug testing of permit holders on the racetrack. *See* § 24.3. The Jockeys' Guild seeks to have the Commission amend its permit holder drug testing rule to preserve safety on the racetrack, while providing safeguards for individual permit holders.

The Commission decided that the Guild's proposals were generally well-taken. Therefore, the Commission decided to adopt the Guild's suggested rule changes with some modifications. The resulting proposed amendments are contained in § 24.3. of the rule. The Commission thanks the Jockeys' Guild for making this proposal to improve West Virginia's rule.

HOLLYWOOD Casino®
AT CHARLES TOWN RACES

VIA EMAIL

Mr. Joe Moore
Executive Director
West Virginia Racing Commission
900 Pennsylvania Avenue Suite 533
Charleston, WV 2530

July 14, 2017

Dear Mr. Moore:

Hollywood Casino at Charles Town Races ("HCCTR") wishes to exercise its right to submit a public comment regarding the recently filed proposed changes to the West Virginia Thoroughbred Rules of Racing (the "Rules of Racing"). HCCTR is providing comments that both support language and policy changes already included in the revised Rules of Racing, as well as some suggested modifications. While HCCTR will offer some additional suggestions, we will do our best to limit the public comments herein that go outside of the actual changes proposed to the Rules of Racing versus using this as a stage to suggest how the Rules of Racing should look if we had the opportunity to unilaterally write them.

I. Proposed Rule 20.3

We applaud the West Virginia Racing Commission (the "WVRC") in taking the step of drafting proposed Rule 20.3 regarding wagering by certain permit holders employed by licensed tracks, but HCCTR does not believe it goes far enough and should, in actuality, preclude all employees of the association from placing wagers at the venue of their employment, placing wagers on races taking place at the venue of their employment or receiving financial remuneration from wagers being made. Likewise, we don't believe it would be proper for members of the WVRC or its staff from placing wagers in the jurisdiction they are in charge of overseeing.

Should managers have the ability to place wagers or receive some financial benefit from a wager placed, it would – of course - likely create a perception issue. However, simply because someone is a certain level on an organizational chart does not mean such a perception issue wouldn't exist otherwise. You might notice that you won't see poker dealers here at HCCTR playing poker even when they are not on duty. We don't understand why racing should be different. And by way of background, that is also HCCTR's current employee policy. In terms of WVRC members and staff, we think the perception issues would be obvious.

As such, HCCTR believes the following proposed language to be far better at suiting the aims of making sure wagering by association employees or the WVRC is prohibited by rule:

> *Any person holding an occupational permit that is employed by a licensed racetrack shall not wager on any pari-mutuel race while within the confines of the licensed racetrack that employs them, receive financial remuneration from any wager on a pari-mutuel race made within the confines of the licensed racetrack that employs them, wager on the outcome of any live race conducted at the licensed racetrack that employs them or receive financial remuneration from any wager made on the outcome of a race conducted at the licensed racetrack that employs them. Any member, employee or staff member of the West Virginia Racing Commission shall not wager on or receive financial*

remuneration from any wager placed on a pari-mutuel race taking place in West Virginia or any wager placed at either a licensed racetrack or any other venue licensed to take pari-mutuel wagers located in West Virginia.

In terms of the change from the language of indirectly placing a wager to receiving remuneration for a wager made, the problems here would really arise if the individual is receiving some type of financial benefit. HCCTR is pretty sure that the term "indirectly place a wager" is meant to stop people from telling others to place wagers on their behalf. We're concerned that should the track handicapper (or any other employee for that matter) offer their opinion as to who might win a race and somebody watching our simulcast feed or is here at the track agrees with their analysis and makes that wager, it might fall under the guide of indirectly placing a wager. That's obviously a situation we need not stop unless the person is on the receiving end of some financial benefit.

II. Proposed Rule 26.3.o

HCCTR is in full support of proposed Rule 26.3.o that prohibits the transfer of horses from a suspended individual to other individuals having defined relationships to the suspended person.

One of the most significant problems we have in the racing industry is the use of program trainers that are substituted in on paper for individuals suspended or ruled off the racetrack. Having the ability to be issued a severe suspension yet transfer the horses on paper to a son, daughter or lifelong assistant often makes a complete mockery of the sport and renders the rules close to meaningless. Unless fines are exorbitant, there is little motivation to those breaking the rules to cease pushing the envelope knowing they can simply "transfer" trainership in name only to a different person and carry on in a fashion that closely mimics business as usual. Likewise, the public has a right to know who is actually training the horses in question and that transfers to such closely aligned individuals that so rarely pass the proverbial smell test aren't going to be allowed.

While HCCTR has and will continue to take action against those we believe to be functionally leasing out their name and license to someone else, heading off some of these transactions before they are consummated is a vital step. The proposed rule closely mirrors one the Breeders' Cup has instituted and does nothing but provide an additional safeguard against a practice that does little outside of undermine the integrity of our sport.

III. Changes to Veterinarian Protocols & Medication Guidelines

The changes in the proposed rules dealing with veterinarian protocols and medication guidelines appear consistent with the ARCI Model Rules, which is what was recommended by the National Thoroughbred Racing Association's Safety & Integrity Alliance. HCCTR is pleased that the WVRC has continued to keep pace with the changing medication rules in our industry to the best of its ability given the procedure by which administrative regulations must go through to be passed.

IV. Third-party Lasix Administration

On the topic of changes to veterinarian protocols and medication guidelines, HCCTR believes the issue of third-party Lasix administration should be revisited. While the Rules of Racing were previously altered to control the administration of Lasix on race day to the point of where such administration must be "under the supervision of a person employed by the Racing Commission", it does not conform to the ARCI Model Rule on Lasix administration. This issue is not addressed in the proposed rewrite of the Rules of Racing that includes many other modifications to medications and veterinary procedures.

Numerous jurisdictions have gone to the approach where Lasix is not provided by private veterinarians whether under the supervision of a regulatory vet or not and this full, third-party Lasix administration has been endorsed by such industry groups as the Racing & Medication Testing Consortium (the "RMTC"), Jockey Club, Breeders' Cup, National Thoroughbred Racing Association and Thoroughbred Racing Associations. It has been deemed so important that it's been made one of the pillars of the RMTC's National Uniform Medication Program.

For an example of how it could play out if not altered, Dr. Dionne Benson, the executive director for the RMTC, indicated in a 2016 Bloodhorse article that there has been evidence of private veterinarians adding additional supplements to their Lasix administration and stated in part:

> *"I think the reason third-party Lasix is so important is that there are so many things you can do on race day that you can't test for. And a lot of them involve manipulation of the horse's normal system. You add a little more of what the horse already has. It affects the metabolic processes downstream and it will either get the horse to calm down or be excited or any combination of those. There are substances you could give three hours out that the horse will stay calm for three hours but when they are awake, they really kind of pop awake. So the idea is that we can avoid that whole issue by not having the temptation of having a vet in the stall on race day."*

While HCCTR believes West Virginia is lagging behind in terms of how it's dealing with the administration of Lasix, following along at this point is a far better alternative with respect to third-party Lasix administration versus refusing to adopt it either way. HCCTR believes the appropriate solution to be replacing existing rules 49.7.a.through 49.7.e in the Rules of Racing with what is currently contained in ARCI-025-020(F) and reads:

F. Furosemide

1) *Furosemide may be administered intravenously to a horse, which is entered to compete in a race. Except under the instructions of the official veterinarian or the racing veterinarian for the purpose of removing a horse from the Veterinarian's List or to facilitate the collection of a post-race urine sample, furosemide shall be permitted only after the official veterinarian has placed the horse on the Furosemide List. In order for a horse to be placed on the Furosemide List the following process must be followed.*
    a) *After the horse's licensed trainer and licensed veterinarian determine that it would be in the horse's best interests to race with furosemide the official veterinarian or his/her designee shall be notified using the prescribed form, that the horse is to be put on the Furosemide List.*
    b) *The form must be received by the official veterinarian or his/her designee by the proper time deadlines so as to ensure public notification.*
    c) *A horse placed on the official Furosemide List must remain on that list unless the licensed trainer and licensed veterinarian submit a written request to remove the horse from the list. The request must be made to the official veterinarian or his/her designee, on the proper form, no later than the time of entry.*
    d) *After a horse has been removed from the Furosemide List, the horse may not be placed back on the list for a period of 60 calendar days unless it is determined to be detrimental to the welfare of the horse, in consultation with the official veterinarian. If a horse is removed from the official Furosemide List a second time in a 365-day period, the horse may not be placed back on the list for a period of 90 calendar days.*
    e) *Furosemide shall only be administered on association grounds.*
    f) *Furosemide shall be the only authorized bleeder medication*

2) *The use of furosemide shall be permitted under the following circumstances on association grounds where a detention barn is utilized:*
    a) *Furosemide shall be administered by the official veterinarian, the racing veterinarian or his/her designee no less than four hours prior to post time for the race for which the horse is entered.*
    b) *Any veterinarian or vet techs participating in the administration process must be prohibited from working as private veterinarians or technicians on the race track or with participating licensees;*
    c) *A horse qualified for furosemide administration must be brought to the detention barn within time to comply with the four-hour administration requirement specified above.*
    d) *The dose administered shall not exceed 500 mg. nor be less than 150 mg.*
    e) *Furosemide shall be administered by a single, intravenous injection.*
    f) *After treatment, the horse shall be required by the Commission to remain in the detention barn in the care, custody and control of its trainer or the trainer's designated representative under association and/or Commission security supervision until called to the saddling paddock.*
3) *The use of furosemide shall be permitted under the following circumstances on association grounds where a detention barn is not utilized:*
    a) *Furosemide shall be administered by the official veterinarian, the racing veterinarian or his/her designee no less than four hours prior to post time for the race for which the horse is entered.*
    b) *Any veterinarian or vet techs participating in the administration process must be prohibited from working as private veterinarians or technicians on the race track on or with participating licensees;*
    c) *The furosemide dosage administered shall not exceed 500 mg. nor be less than 150 mg.*
    d) *Furosemide shall be administered by a single, intravenous injection.*
    e) *After treatment, the horse shall be required by the Commission to remain in the proximity of its stall in the care, custody and control of its trainer or the trainer's designated representative under general association and/or Commission security surveillance until called to the saddling paddock.*
4) *Test results must show a detectable concentration of the drug in the post-race serum, plasma or urine sample.*
    a) *The specific gravity of post-race urine samples may be measured to ensure that samples are sufficiently concentrated for proper chemical analysis. The specific gravity shall not be below 1.010. If the specific gravity of the urine is found to be below 1.010 or if a urine sample is unavailable for testing; quantitation of furosemide in serum or plasma shall be performed;*
    b) *Quantitation of furosemide in serum or plasma shall be performed when the specific gravity of the corresponding urine sample is not measured or if measured below 1.010. Concentrations may not exceed 100 nanograms of furosemide per milliliter of serum or plasma.*
5) *The administering authority or association may assess a fee approved by the commission on licensed owners of treated horses to recoup the reasonable costs associated with the administration of furosemide in the manner prescribed in these rules.*

V. Existing Rule 26.1.b

Pursuant to the recommendations by the National Thoroughbred Racing Association's Safety & Integrity Alliance, HCCTR respectfully requests the WVRC to alter Rule 26.1.b in the Rules of Racing to conform to ARCI Model Rule 008-020(A)(1-4), that reads:

ARCI-008-020 Trainers

Eligibility

1) An applicant for a license as trainer:

a) be at least 18 years of age.

b) shall, in the case of not being previously licensed, be qualified, as determined by the stewards or other commission designee, by reason of:

A. at least 2 years experience as a licensed assistant trainer, or comparable experience in other equine disciplines, or college-level education in equine science and/or horsemanship.

B. submission of two written statements from trainers currently licensed in that jurisdiction as to character and qualifications of the applicant, and one written statement from a currently licensed owner stating intent to place one or more horses with the applicant, when licensed.

C. shall be required to pass a written examination, oral interviews with the stewards and regulatory veterinarian; and demonstrate practical skills.

2) A trainer licensed and in good standing in another jurisdiction, having been issued within a prior period as determined by the commission, may be accepted if evidence of experience and qualifications are provided. Evidence of qualifications shall require passing one or more of the following:

a) A written examination;

b) A demonstration of practical skills;

c) An interview with the stewards.

3) Upon timely request to the stewards due to disability or other factors affecting the applicant's ability to effectively complete the trainer's test (such as illiteracy or language barriers), reasonable accommodations may be made for the applicant including, but not limited to oral administration of the examination, use of a preapproved translator, and aid from pre-approved assistant where deemed appropriate by the Stewards administering the examination.

4) Beginning no later than January 31, 2012, in order to maintain a current license, trainers must complete at least four (4) hours per calendar year of continuing education courses approved by the ARCI or the commission in that jurisdiction.

VI. Existing Rule 39.3.a

As I'm sure the WVRC is well aware, the Charles Town HBPA has raised an objection over current Rule 39.3.a. It is our understanding that they will be submitting as part of their public comments a proposed alteration to that rule allowing for two horses trained by the same individual but owned by different owners or ownership groups the trainer is not a part of be given an equal draw without the trainer having to prefer one of the two entries should the race overfill.

Pending the exact language that would alter current Rule 39.3.a, HCCTR raises no objection to the spirit of this change and should the suggested language be consistent with what we believe that spirit to be, we'd be supportive of the CTHBPA's proposal.

VII. Pari-Mutuel Rules

While we understand the WVRC's reticence to submit any alterations to West Virginia's Wagering Rules, we would simply like to voice the change HCCTR previously sought that would change the minimum payout for every two-dollars ($2.00) wagered to two-dollars and ten cents ($2.10).

Currently, as it stands, the only jurisdictions in the country that do not pay $2.10 for every $2.00 wagered are West Virginia and Iowa. A minimum payout of $2.10 has become the national standard save the two

aforementioned outliers, of which we are one of. A reduction to a minimum of payout of $2.10 does not preclude a track from offering a minimum of $2.20 in any way and instead gives the tracks the option of reducing said minimum to $2.10 or continuing to shoulder whatever level of exposure they may feel that a $2.20 minimum creates. As of now, we do not have that option.

As was stated above, we understand this will almost certainly not be taken up in this rewrite, but would encourage it to be a topic for serious discussion the next time the task of examining the Rules of Racing is undertaken.

We'd like to thank the WVRC for the opportunity to issue a public comment on the proposed Rules of Racing. Again, HCCTR does have other alterations to the Rules of Racing as currently written we would like to see made and this public comment does not mean we are forgoing them or will not raise them at a later date. We did, however, want to keep these comments contained the proposed rule changes as much as possible. Should you have any questions of us in the interim.

Regards,

Erich Zimny
Vice President of Racing Operations

CC: Chris McErlean
Dickie Moore
Charlie McIntosh

Charles Town
Horsemen's Benevolent & Protective Association

VIA U.S. MAIL

July 17, 2017

West Virginia Racing Commission
900 Pennsylvania Avenue, Suite 533
Charleston, WV 25302

Re: Proposed Amendments to Thoroughbred Racing Rule 178 CSR 1

This letter shall serve as the public comment of Charles Town HBPA, Inc. ("CTHBPA") to the amendments to Thoroughbred Racing Rule 178 CSR 1 proposed by the West Virginia Racing Commission (the "Commission"). CTHBPA is a member affiliate of the National HPBA and is tasked with protecting the general welfare of the racing industry, including the interests of nearly 3,500 horsemen, horsewomen, their employees, and the families of backstretch personnel. The CTHBPA wholeheartedly supports the Commission's efforts to improve the integrity of thoroughbred racing in West Virginia.

CTHBPA has carefully reviewed the proposed amendments, discussed sequentially below, and while the CTHBPA can support, or support with modifications some of the proposed amendments, it believes that certain of the amendments proposed by the Commission are ill-suited to West Virginia, create significant legal and practical issues, interfere with veterinary practice, will endanger horses and humans, and should not be adopted in their current form.

Proposed new Rule 20.3 – Management Wagering: CTHBPA agrees that the management of a track should not wager, directly or indirectly, on races at a licensed racetrack where a manager is employed in order to avoid perceptions of favoritism and to avoid the possibility of impropriety. However, CTHBPA does not perceive the same concerns when management at one facility wagers on races at another facility *e.g.*, Mountaineer's management should be able to wager on races at Charles Town and see no reason to limit the handle. CTHBPA proposes the following language:

> Any person holding an occupational permit who is actively engaged in the management of any aspect of the operations of a licensed racetrack shall not directly or indirectly wager on the outcome of any race ~~under the jurisdiction of the Racing Commission~~ at such licensed racetrack.

Proposed amended Rule 24.11.g Mistreatment of "Another Animal": CTHBA is categorically opposed to unlawful animal mistreatment which is itself illegal in West Virginia.

See W. Va. Code § 61-8-19. However, by adding the term "another animal" to this Rule, the Rule is so broadened as to include the entire biological kingdom of *Animalia* and therefore, causes CTHBPA members concern at the risk of baseless allegations. For example, CTHBPA members necessarily and routinely exterminate rats in the barns and would not wish to see their occupational permits jeopardized for vermin control.

CTHPBA believes that the proposed rule exceeds the authority of the Commission. The Commission has the authority to regulate horse racing, which undoubtedly includes the abuse and mistreatment of race horses. But, the prevention of abuse of all animals (other than race horses), while a laudable goal, is already subject to civil and/or criminal penalties in other WV statutes, and is *not* within the jurisdictional ambit of the Commission.

Furthermore, the rule does not include any requirement that the permit holder actually be convicted of animal cruelty, but merely that there has been some allegation of wrongdoing. This creates the potential for significant mischief and the use of animal abuse allegations in the racing context as an artifice to punish permit holders for unrelated conduct that cannot otherwise be proven by the Commission or a racing association. For purposes of comparison, § 178-1-24.11(a) requires that a permit holder "has been convicted of a crime in any jurisdiction," and even the statutory requirements for a veterinary license in West Virginia prohibit only "animal abuse or neglect" that was the subject of a prior criminal conviction. W. Va. Code § 30-10-8(b)(8). In fact, the criminal conviction subsection of § 178-1-24.11 already gives the Commission the authority to suspend a trainer for animal abuse or mistreatment to the extent that the permit holder has been criminally convicted of such conduct. This current authority is sufficient to accomplish the goals of the Commission.

However, if the Commission is still inclined to amend the Rule, CTHBPA's proposal, which is consistent with W. Va. Code § 19-34-7(d) would be:

> has abandoned, mistreated, abused, neglected or engaged in an act of cruelty to a horse or ~~another animal~~ has been convicted of animal cruelty in a court of competent jurisdiction.

By requiring a conviction in a court of competent jurisdiction, the Racing Commission will not improperly expand its statutory authority to all animals, but will merely be taking action to protect the integrity of racing and the safety of thoroughbred race horses from those convicted of animal cruelty.

Amended Rule 26.3.o - Suspended Trainer Transfer Rule

This proposal implicates the legal rights of three categories of occupational permit holders: the owner, a suspended or revoked trainer, and others "associated" with such trainer. The current version of § 178-1-26.3o provides that the owner of a horse in the care of a suspended trainer may apply to the stewards for approval of the transfer of that horse to another trainer holding an occupational permit. The rule does not provide any specific criteria for the stewards to utilize in determining whether to approve or deny a proposed transfer, but states that the suspended trainer shall not be involved in the training of the horse and shall not benefit

financially from the training of that horse. The Commission seeks to amend § 178-1-26.3o to add an absolute and unconditional prohibition on the transfer of a horse from a suspended trainer to any person that "was an assistant to or employee of the trainer; if such person is related to the trainer by blood or by marriage or by domestic partnership; or if such person is related by blood to the spouse or domestic partner of such trainer at the time of the revocation or suspension." The stated purpose of this amendment is to "stop suspended trainers from financially benefitting from horses that are no longer under his/her trainer-ship due to a suspension." Form 1, pg. 2.

CTHBPA agrees with the Commission that a suspended trainer should not be able to benefit financially from horses that are no longer under his or her care, nor should such trainer be permitted to control the training of horses during his or her suspension. The proposed absolute prohibition on the transfer of a horse to a permit holder that is in any way "associated with" a suspended trainer, however, is a crude mechanism to achieve the stated goal and raises significant constitutional concerns. The holder of an occupational permit has a property interest in his or her permit and, as such, the Commission cannot suspend, revoke or modify the rights granted pursuant to that permit without affording the holder "due process of law." *PNGI Charles Town Gaming, LLC v. Reynolds*, 727 S.E.2d 799, 808 (W. Va. 2011). Implicit in due process is the principle that "guilt is personal," *Scales v. U.S.*, 367 U.S. 203, 224-225 (1961) and that "legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (emphasis added). Rules which place legal restraints on the rights of a permit holder, based solely upon the conduct of another person, offend this basic principle. The Commission's own recognition of this principle is evidenced by § 178-1-24.11, which sets forth the conduct that may subject a trainer to the suspension of his or her license or preclude a trainer from obtaining a license in the first instance – each of the enumerated acts in this section are personal to the trainer (*i.e.*, are based on actions taken by the trainer himself) and no trainer is subject to suspension of his permit for the misconduct of another person (except as justified by the trainer responsibility rule). There is no basis to depart from this concept of individual responsibility in the trainer transfer context.

The same constitutional concerns implicated by the Commission's proposed transfer rule were aptly described by a New York state court in its decision enjoining a license suspension issued by a horse racing association:

> [Association Rule 704] employs a kind of guilt by association to extend a suspension not only to the accused person but to his spouse, family members, companions, employees, agents or others, supposedly to avoid the appearance that the suspended person is attempting to evade the sanction by having someone else front for him. In actuality this is a kind of Bill of Attainder. In feudal law, the attaint attached when a person was corrupted or stained by the commission of any felony, as a result of which there was a "corruption of blood" and his relatives and heirs forfeited their rights to his property. This would appear to be too broad a sanction in the absence of some showing of an attempt to bypass the original sanction. To bar all relatives and associates . . . appears to go too far.

Lindemann v. American Horse Shows Ass'n, Inc., 624 N.Y.S.2d 723, 734 (N.Y. Sup. Ct. Pt. 4, 1994) (internal citations omitted). *See also Tyson v. N.Y. City Housing Auth'y*, 369 F. Supp 513, 518-519 (S.D.N.Y. 1974) ("guilt by association is antithetical to the concepts of personal guilt and individual responsibility which are touchstones of the Anglo-American system of law."). These due process issues are compounded by the fact that the proposed rule, by its very nature, does not grant the 'attainted' permit holder a hearing prior to the imposition of this sanction, nor does it provide such permit holder with an opportunity, either pre- or post-deprivation, to prove that he or she is not colluding with the suspended trainer and is, instead, the recipient of a *bona fide* transfer.

In addition to the above due process concerns, the proposed rule, as it relates to transfers to spouses, domestic partners, or their families, implicates the right of "freedom of association" guaranteed by the Constitution. The First Amendment protects citizens from any government action which unduly interferes with their right to "intimate association," including but not limited to the right to marry and to be married. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). A government regulation, therefore, which imposes a sanction based exclusively upon one's intimate association with another raises significant first amendment concerns, as was previously recognized by the Washington Racing Commission:

> The spousal disqualification regulation as applied in this case infringes on Levinson's right to marry, while at the same time, it offers little protection to the integrity of the horse racing profession. Without some evidence in a hearing showing that Levinson's ownership of the horse was merely a prop to evade regulations which preclude her husband from race horse ownership, we do not believe that the Commission can revoke her license. Any such blanket regulation violates the constitutional requirement that an infringement on the right to marry be narrowly tailored to meet the state interest involved.

Levinson v. Washington Horse Racing Com'n, 740 P.2d 898, 902 (Wash. App. 1987).[1]

Based upon the above, CTHBPA submits that the proposed trainer transfer rule should not be adopted in its current form. The existing rule provides the stewards with the authority to deny the transfer of a horse to a new trainer if the suspended trainer will maintain control over the training of the horse and/or benefit financially from the training of that horse. In making this determination, the stewards are well within their rights to view transfers to family members or other associates of a suspended trainer with scrutiny, and thus, to request additional information from the parties to establish the *bona fides* of the proposed transfer. In the event that the stewards determine that the proposed transfer is, in fact, a sham transaction, they have the authority to deny the transfer request. In that case, the owner of the horse and/or the proposed trainer transferee would be entitled to exercise the due process rights afforded to them by the thoroughbred rules and to challenge the determination of the stewards if they believe it was made in error. By eliminating the discretion of the stewards and creating an absolute transfer

[1] Although not the subject of this comment, the HBPA would note that the spousal disqualification rule included in § 178-1-39.1.h suffers from this same constitutional infirmity.

prohibition, the proposed rule will curtail valid third-party transfers made for legitimate business reasons (thereby interfering with the economic opportunities of the new proposed trainer and the owner) and, more significantly still, will eliminate the due process rights of the affected owner / trainer transferee by precluding them from providing evidence which could definitively establish the validity of the transfer. The proposed rule, as drafted, is overbroad, constitutionally infirm, and does nothing to clarify the existing authority of the stewards and the Commission, who are already empowered to prevent suspended trainers from benefitting financially, while under suspension, from horses they previously trained (the stated purpose of the proposed rule).

Proposed *new Rule 29.3.e. – Trainer Consent Required to Name a Jockey:* CTHBPA does not object to this proposed rule.

Proposed new Rule 41.2.g. – Exclusion of Disabled or Sick Horses for a Hard 7 Days

There are two aspects of this proposed new Rule to which CTHBPA objects: First, the category of exclusion for "physical disability" is qualitatively distinct from exclusion for "sickness" as the former implies a serious condition that will require time to heal, while the latter encompasses all manner of "sickness" including the "coughing horse" and the common malady of the "snotts" for two year olds, both of which are minor, but common occurrences. If the proposed Rule was amended to strike-out "sickness", but leave "physical disability", this portion of the CTHBPA's objection would be resolved.

The second aspect of concern is the hard seven days of exclusion, which for all practical purposes, will result in ten days of exclusion. The hard seven days unnecessarily curtails the professional judgment of the Racing Commission veterinarian and is simply too long. While some might argue to leave the duration of the exclusion completely in the professional medical judgment of the Racing Commission veterinarian, the CTHBPA is willing to compromise at a five day exclusion.

Proposed amendments and additions: Rule 44.14 and renumbered Rules 44.18, 44.19

CTHBPA does not object to these Rule additions and amendments.

Amended §178-1-48 Veterinary Practices

However well-intentioned might be the desire to create a year-round medical administration record that consists solely of actual veterinary visits matching every administration of any prescribed medication, including therapeutic medications, to each horse, this not feasible based on the limited availability of large animal veterinarians who make farm visits; it interferes with the ethical practice of veterinarians whose ethical rules of practice expressly permit the bulk sale and administration of out-of-competition medications; would cause undue and unnecessary expense upon all trainers and would likely drive many trainers out of business; and, in certain cases, would directly cause terrible suffering and even death to horses in the absence of an available veterinarian.

There are approximately six large animal veterinarians available to provide medical care to thoroughbred horses in the Eastern Panhandle. Not all of those veterinarians make farm visits (example: one is veterinary orthopedic surgeon) and of the remaining five, absent an ongoing relationship with a particular farm, a veterinarian may refuse to make a farm visit, or as happens many times, there is simply no veterinarian available due to other emergency assignments, vacations, etc.

Perhaps in recognition of the limited number of veterinarians, the various circumstances in which horses need out-of-competition medication, including therapeutic medications, and in acknowledgment of the breadth of knowledge and experience of trainers, the American Veterinarian Medical Association has promulgated ethical rules of conduct that expressly allow for bulk prescription medication delivery and use as opposed to horse-by-horse dispensing: "A veterinarian shall honor a client's request for a prescription or veterinary feed directive in lieu of dispensing, but may charge a fee for this service." AVME, Art. VII, Section (f)(iii). Bulk delivery is both efficacious and substantially reduces medication and veterinarian expense thus allowing small businesses to continue in operation.

If bulk use is prohibited and absent an on-site veterinarian, the proposed Veterinary Practices rule will place trainers in the untenable position of having to choose between risking their occupational permits for self-treating sick thoroughbred horses or enduring the cruel, unnecessary deaths of their horses. For example, here's a very real and recurring situation: a horse displays symptoms of pawing at the ground, rolling or wanting to lie down, lack of defecation, lack of appetite and excessive sweating. Every trainer confronting these symptoms recognizes equine colic and knows that if left untreated for any period of time – even an hour – the condition is life threatening to the horse. Every trainer in this circumstance will attempt to contact a veterinarian, but there's no assurance at all that a veterinarian is available and can arrive to treat the horse in time.

In this situation and under the current rules, a trainer will administer Banamine purchased in bulk. But if bulk purchase and administration is foreclosed as is the case with the proposed revisions to the Veterinary Practice rule, a trainer will be confronted with the choice of a terrible, unnecessary death of a horse or medicating the horse without a veterinarian present.

There are many other medications, including therapeutic medications, legally available, commonly purchased in bulk, that veterinarians routinely approve for out-of-competition use by trainers/farm managers without need of in-person dispensing by a veterinarian to a particular horse that are essential to the welfare of horses and the continuing viability of numerous trainers' businesses. This proposed Rule is both unnecessary, will be extremely costly, and will interfere with the ethical practices of veterinarians and trainers.

For example, proposed Rule 48.5.f.3.C [defining "Therapeutic, evidence based treatment plan"] and its subparts mandates a written, planned course of treatment prescribed by an attending veterinarian before a horse is treated that explains the medical need, describes the scientific or clinical basis for using the doping agent, and requires a determination that recognized therapeutic agents do not exist. And all of this has to be done for every individual horse before any treatment. These proposed rules interfere with the veterinarian – patient

relationship and will impose substantial unnecessary costs on trainers/owners. The Commission absolutely must hear from veterinarians in the field before moving forward with such rules.

With regard to proposed Rules 48.5.f.1 and 48.5.f.2, we have serious concerns about the Table referenced. For example, the use of Regumate in colts/stallions is banned at all times in or out of competition. So those using it for *behavior control* in rank colts/stallions will have to cease using it. This is a human safety issue. Regumate in this group of horses is simply a human safety concern, as without it, trainers will have to manage an increasingly aggressive horse for a longer period of time.

In this same category, 48.5.f.3.A and its subparts is too broad, vague and ambiguous in its use of phrases such as "pharmacologic potential," "causing an action or effect on [every body system of a horse], and "but not a substance that is considered to have no effect on the physiology of a horse except ...." This rule should receive rigorous analysis by medical professionals.

For these reasons, CTHBPA respectfully requests that this proposed Rule remain in its current form and the new proposed rules be rejected.

Proposed and Amended 49.14 et seq. - Out-of-Competition Testing Rule

West Virginia currently authorizes the Commission to conduct out-of-competition testing of thoroughbred racehorses in the manner set forth in § 178-1-49.14. The Commission seeks to make wholesale changes to this rule by adopting, in their entirety, the new model out-of-competition testing rules drafted by the Association of Racing Commissioners International. CTHBPA supports out-of-competition testing as a general proposition, but believes that the proposed rules raise significant constitutional and practical concerns and should not be adopted by the Commission. The proposed rules are based on model rules that are in their infancy and have not been implemented, for any meaningful period of time, in any other jurisdiction. Given the substantial concerns outlined below, CTHBPA believes that prudence mitigates in favor of, at a minimum, delaying the implementation of the proposed rules until their efficacy and consequences can be more fully examined.[2] Significantly, the Commission has not identified a single problem with its existing out-of-competition testing rule that would be remedied by adoption of the proposed rule.

Out-of-competition testing by the Commission implicates both the jurisdictional limits of the Commission's authority and the Fourth Amendment's protection against unreasonable search and seizure. The Commission has the plenary power to regulate virtually all aspects of horse racing, but *only* within the State of West Virginia. W. Va. Code § 19-23-6; *Reynolds*, 727 S.E.2d at 806. Thus, in order for the Commission to lawfully conduct a test of a horse which is not

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[2] Certain of the issues with the proposed rule were addressed in a panel discussion with veterinary experts at the National HBPA convention. Excerpts of the panel's remarks were published by the Blood Horse magazine and are available for review at http://www.bloodhorse.com/horse-racing/articles/220380/out-of-competition-rule-examined-at-hbpa-convention.

currently racing in West Virginia and/or is not physically located in West Virginia, there must be a sufficient nexus between the testing of that horse and the regulation of licensed horse racing in the State of West Virginia. *See Henriksen v. Illinois Racing Bd.*, 688 N.E.2d 771, 774 (Ill. App.1st Dist. 1997) (state racing commission rules do not have extraterritorial application); *McDaniel v. W. Va. Div. of Labor*, 591 S.E.2d 277, 285 (W. Va. 2003) (administrative agencies only have those powers conferred on them by the legislature).[3] Further, in a regulated industry, like the racing industry, a regulation authorizing a search (*i.e.*, a drug test) will only satisfy the strictures of the Fourth Amendment if it is "carefully limited in time, place and scope," "limits the discretion of the inspecting officers," and is "sufficiently comprehensive and defined" such that it provides "a constitutionally adequate substitute for a warrant." *Anobile v. Pellegrino*, 303 F.3d 107, 117-118 (2d Cir. 2002) (quoting *York v. Burger*, 482 U.S. 691, 702-703 (1987)). Thus, any consideration of the Commission's proposed out-of-competition testing rule must be done with these legal restrictions in mind.

The proposed testing rule provides that, in addition to blood and urine samples, the Commission is also authorized to obtain "other biological samples from a horse," for purposes of out-of-competition testing. § 178-1-49.14.a (proposed version). This blanket authority to engage in unspecified collection activities is problematic on a number of levels. First, by authorizing the collection of unspecified biological samples by unspecified means and by failing to limit the discretion of the Commission's inspectors in this same regard, the proposed rule lacks the level of specificity required by the Supreme Court's ruling in *Burger* – a roving authority to collect *any* sample by *any* means is not a "constitutionally adequate substitute for a warrant." Second, the authority to collect "other biological samples" necessarily includes the authority to collect samples in an invasive manner or in a way that otherwise interferes with the preparation of a horse for racing. For example, the proposed rule would permit Commission inspectors to perform biopsies or to collect semen samples if it were determined that such biological materials "enhance[d] the ability of the Commission to enforce its medication and anti-doping rules." § 178-1-49-14.a (proposed version). Although CTHBPA is not suggesting that the Commission intends to undertake these procedures at this juncture, their ability to do so in the future, based upon the authority granted by the proposed rule, raises troubling constitutional concerns.

In order for an out-of-competition testing regime to satisfy the specificity requirement of *Burger* and to be within the plenary authority of the Commission, it must be limited to the testing of horses that are racing, or training to race, in West Virginia. In recognition of this limitation, the Commission has provided a list of circumstances that result in the 'presumption' that a horse is intending to race in the State. § 178-1-49.14.c. Each of these circumstances, however, is overbroad and will necessarily sweep within the rule's reach horses that have not, and may never have intended to be, raced in West Virginia.[4] These horses are not subject to the plenary

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[3] In fact, § 178-1-1.1, which governs the scope of the thoroughbred rules, specifically provides that "[t]his rule [in which the out-of-competition testing rules are included] regulates the conduct of thoroughbred racing in this state . . ." (emphasis added).

[4] For example, the presumption arises if a horse is "owned by an owner holding an occupational permit." § 178-1-49.14.c.2. An owner must obtain an occupational permit if he intends to race any horse in the State of West Virginia. § 178-1-25. Therefore, an owner with a stable of 100 horses located exclusively in California and New York is required to obtain an occupational permit if he intends to race 1 of those horses on 1 occasion in the State.

authority or reach of the Commission, and therefore, cannot be subject to out-of-competition testing by the Commission. The rule, however, includes a 'savings clause,' which provides that a party may provide "evidence that a horse is not engaged in activities related to competing in horse racing in the jurisdiction" thereby rebutting the presumption that it is subject to out-of-competition testing. In order for this rebuttal right to salvage the overbreadth of the presumption, however, owners and trainers must be able to notify the Commission in advance of any inspection that a particular horse or horses are not racing, or training to be raced in West Virginia, and thus, cannot be legally subjected to out-of-competition testing, otherwise, a party is left in the untenable position of proving a negative. The proposed rule does not provide any specificity as to how or when a person may inform the Commission of the fact that owner- or trainer-specified horses subject to the presumption are "not engaged in activities related to competing in horse racing in the jurisdiction," nor does it provide any indication of the "evidence" that would be required by the Commission in order to rebut the presumption.[5] As such, the proposed rule, in its current form, authorizes testing that exceeds the authority of the Commission and fails to satisfy the requirements of the Fourth Amendment.[6]

The most significant change to the existing rule is the scope of medications and other substances subject to the out-of-competition testing regime. The existing rule limits "prohibited substances," for purposes of out-of-competition testing, to blood-doping agents, gene-doping agents, non-therapeutic steroids and growth hormones, and certain venoms. §§ 178-1-49.14.e.1 - 6 (current version). The inclusion of this discrete group of banned substances in the prohibited list was based on the recognition that trainers and veterinarians regularly use medications and other substances for legitimate therapeutic purposes (as evidenced by the need for withdrawal times and threshold levels) and that those permitted substances would almost certainly appear in any out-of-competition test. Under the proposed rule, however, out-of-competition testing includes all substances and medications included in the RCI Prohibited List, including the very therapeutic medications regularly used by many trainers and veterinarians for the welfare of the horse. § 178-1-49.14.a (proposed version). In order to preclude these medications from producing a positive out-of-competition test and subjecting the trainer/owner to the associated penalty, the horse's treating veterinarian would need to create and file a treatment plan with the

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Under the proposed rule, all 100 of the owner's horses, located in New York and/or California, would be presumed to be raced in West Virginia and subject to out-of-competition testing by the Commission.

[5] It is unclear what "evidence" a permit holder (like the owner in the footnote above) could actually provide to the Commission to prove that a particular horse that is in training will *not* be raced in West Virginia at any time in the future, other than the word of the trainer or owner themselves. Given the "conclusive" effect of the eligibility presumptions set forth in amended 49.14.d, including ownership of a horse by "an owner" holding an occupational permit in 49.14.c.2, the practical effect is authorize out-of-competition testing in virtually every circumstance.

[6] One potential "fix" is to permit a declaration from trainers and/or owners that designates specific horses not intended to be raced in West Virginia. Horses so designated would then not be subject to out-of-competition testing, but would also not be permitted to race in West Virginia and placed on an ineligible list unless and until they were removed from the list, and then only after a certain number of days passed such that no performance altering substance could remain in the horse. The trainer and/or owner should also be able to file a declaration removing a specified horse or horses from the ineligible list in which event, the rule should immediately subject the specified horses to out-of-competition testing for the number of days deemed necessary to clear the horse's body of any performance altering substance, and after which time period passes, the horse should then be removed from the ineligibility list and capable of being entered into racing in West Virginia.

Commission before administering these standard medications, even for horses who are months away from racing. This requirement would impose additional costs to the provision of veterinary services and could delay the provision of prompt treatment to a horse based on the 'need' to comply with additional administrative procedures prior to commencing treatment.

The stated purpose of out-of-competition testing is to prevent the use of performance-enhancing drugs that cannot be detected in a post-race test; the revised rule goes far beyond that purpose and creates an administrative minefield through which trainers and veterinarians administering standard therapeutic medications to their horses, often weeks or months before a prospective race, must now maneuver.[7] In fact, the statements of the RCI itself establish that its' out-of-competition testing rules are about far more than out-of-competition testing, but are about redefining the basic nature of the veterinarian-trainer relationship in thoroughbred horse racing.[8] Although changes of this sort may ultimately be beneficial, it is a topic that should be examined not just by this Commission, but also by appropriate regulatory bodies overseeing the practice of veterinary medicine. Furthermore, without a doubt, such a topic must be subjected to thorough public consideration and comment prior to adoption, rather than merely being shoehorned into effect under the auspices of improved out-of-competition testing rules.

Proposed Rule 51.1.b. – Trainer Responsibility for Out-of-Competition Testing

Because CTHBPA objects to out-of-competition testing as proposed, CTHBPA also objects to this Rule on the same grounds as stated *supra*. CTHBPA is also concerned as to whether there is ambiguity caused by the phrase "…prohibited drug, medication or substance…." as all medications are drugs, and all drugs and medications are substances. Thus the question arises as to what exactly is intended by this phraseology? The safer course would be to substitute the phrase "prohibited substance" so as to both include *everything* that is prohibited and to be clear that it is only those things that are *prohibited* are subject to this Rule.

Proposed Rule 52.3 – Veterinarian's List: Specific Conditions

By virtue of its inclusivity of numerous specific conditions and general standards will have the perhaps unintended effect of requiring Racing Commission veterinarians to *diagnose* various conditions, including "illness." This proposed Rule could be considerably simplified by leaving the standard as one of "fitness" – the veterinarian's list will identify any horse determined to be "unfit."

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[7] These same concerns exist for substances that are often used on a therapeutic basis, such as homeopathic and herbal substances, but are not specifically approved by the FDA for use on horses. The detection of these substances in a horse that is weeks away from racing would constitute a violation under the proposed rules.

[8] "Depending on the substance, restrictions may apply beyond documentation in the vet records and formal prescription. In some cases disclosure to or written permission from the commission may be necessary . . . The new rule requires no drug be administered to a race horse except in the context of a valid veterinarian-client-patient relationship between an attending veterinarian, the horse owner (who may be represented by the trainer or other agent) and the horse. No drug may be administered without a veterinarian having examined the horse and provided the treatment recommendation. The rule also requires that veterinary judgments be independent and not dictated by the trainer or owner of the horse." Racing Commissioners International Press Release, *RCI Adjusts MMV Points, Expands Out of Competition Testing Rule*, available at: http://www.arci.com/press-release.html (last visited July 6, 2017).

To be consistent, CTHBPA also requests that 52.3.c be modified to allow for removal after five days, instead of seven days, on the veterinarian's list.

In addition to the Rule changes discussed *supra*, CTHBPA also requests that the following Rules be amended:

Rule 24.11.q. – Due Diligence

The existing Rule is confounding because of the phrase "proper due diligence." The term "due diligence" is not defined and CTHBPA does not know how to distinguish mere "due diligence" from "proper due diligence." CTHBPA proposes the following revision:

> 24.11.p. has knowingly sold a thoroughbred horse for slaughter or, has sold, donated or transferred ownership or possession of a thoroughbred horse without first conducting due diligence as to whether the buyer, donee, or transferee intends to deliver the horse for slaughter. The duty of "due diligence" is presumptively established when 1) the seller, donor or transferor provides the following dated notice, receipt of which is acknowledged in writing by the buyer's, donee's or transferee's dated and notarized signature: "This thoroughbred horse [lip tattoo # and/or stored electronic information on chip implant] shall not be sold, donated or transferred, directly or indirectly, for slaughter." A seller, donor or transferor shall file the executed original dated notice with the West Virginia Racing Commission where it shall be a public record.

By defining due diligence and creating a public repository of horses protected by anti-slaughter clauses, CTHBPA believes that an important step towards ending the slaughter of thoroughbred race horses.

Rule 39.3.a. - Horses Having Common Ties

Based upon a recent revision to the rules, 'coupled entries' have been eliminated in West Virginia and two horses having common ties through ownership or training may be entered into the same overnight race. The revised rule, set forth at § 178-1-39.3.a, further provides that "[u]nder no circumstances may both horses of an entry involving horses having common ties through ownership or training start to the exclusion of a single entry. When making an entry involving horses having common ties through ownership or training, a preference for one (1) of the horses must be made." Although not the subject of a proposed rule change at this point, CTHBPA would be remiss if it did not draw the Commission's attention to an issue with this rule and request that a rule change be proposed at the Commission's earliest convenience. Specifically, CTHBPA requests that the quoted language above be limited to common ties through ownership and not merely through training. CTHBPA believes that this change is consistent with the practice of most racing jurisdictions who, like West Virginia, have eliminated coupled entries. As the Commission is aware, trainers owe an equal duty to all of their owners and cannot and should not favor the interests of one owner over another. By including common ties through training in its restrictions, the Commission has placed trainers in a position where they are forced to decide which one of their owner's horses will be permitted to race and which

will not. This creates significant issues for trainers, particularly those with larger stables, and can lead to the loss of horses for such trainers.

CTHBPA proposes the following revision that would correct the issue:

No more than two (2) horses having common ties through ownership or training may be entered in an overnight race. When horses having common ties through ownership or training are entered in an overnight race, preference by date on day of entry shall be given. ~~Under no circumstances may both horses of an entry involving horses having common ties through ownership or training start to the exclusion of a single entry. When making an entry involving horses having common ties through ownership or training, a preference for one (1) of the horses must be made.~~

CTHBPA thanks the Commission for its review and consideration of these comments. As always, the CTHBPA is available to discuss its comments with the Commission and to work with the Commission to craft language that accomplishes the Commission's stated goals, while protecting the legal rights of West Virginia's horsemen.

Sincerely,

Raymond J. Funkhouser, II

Raymond J. Funkhouser, II
President of CTHBPA

61646621.2

NAARV
NORTH AMERICAN ASSOCIATION
OF RACETRACK VETERINARIANS

P.O. BOX 55168 | LEXINGTON, KY 40555 | TEL: (859) 429-0652 | FAX: (859) 813-5249

July 18, 2017

West Virginia Racing Commission
900 Pennsylvania Avenue, Suite 533
Charleston, WV 25302

Re: Comments on proposed rule changes

The North American Association of Racetrack Veterinarians (NAARV) represents many of the veterinary practitioners serving the West Virginia racing horses. These practitioners serve as the first line of responsibility for the health and welfare of West Virginia horses, and have the largest depth and breadth of knowledge about the appropriate use of medications both in and out of competition. Armed with this knowledge, we attended the RCI Model Rules meeting in Seattle last year to offer input to the Commissioners, as well as participated in conference calls designed to bring stakeholder concerns to the attention of RCI. While a few of our ideas were incorporated into the final Model Rule, most of the offending language remains, and we are committed to opposing the implementation of this rule as written in jurisdictions across the country.

NAARV, in concert with other industry stakeholders, stands firmly in favor of the implementation of Out-of-Competition testing (OOCT). This testing is vital to the integrity of our sport, and provisions for the collection of samples should be adopted in every jurisdiction. However, this testing should be restricted to substances that threaten fairness and equality in racing, AND that cannot be detected in a post-race sample. Extending OOCT to substances that pose no threat unless used in proximity to racing is inappropriate for a myriad of reasons.

Firstly, wide inclusion of therapeutic substances wastes precious financial resources, which would necessarily limit the number of horses that could be tested. Secondly, OOCT extends to farms and even beyond the borders of the State, to horses under the care of persons unknown to the licensing authority. Without regulatory authority over those persons, this rule has a fall back provision to hold the owner responsible with a rule much like the absolute insurer rule applies on the racetrack. While this rule has worked well for infractions on the racetrack, it is a huge overreach, and will function only to eliminate owners from the industry for fear of being held responsible for something not within their control. Finally, many of the substances on the "Prohibited List" of substances have legitimate therapeutic uses out of competition and the strict restrictions are inappropriately severe.

The attached document outlines our issues with the RCI Model Rule which West Virginia proposes to adopt and we urge you to consider major revisions before adopting these regulations.

Sincerely;

Clara K. Fenger

Clara K. Fenger, DVM, PhD, DACVIM

1. Veterinarians' Reports:

48.4. Veterinarians' Reports. Every veterinarian who treats a racehorse at any location under the jurisdiction of the Racing Commission shall, in writing on the Medication Report Form prescribed by the Commission, record in writing report to the Racing Commission Veterinarian or other Commission designee at the racetrack where the horse is entered to run or as otherwise specified by the Commission, the name of the horse treated, any medication, drug, substance, or procedure administered or prescribed, the name of the trainer of the horse, the date and time of treatment and any other information requested by a Racing Commission veterinarian(s). The veterinarian treating the racehorse shall sign each written record of treatment the Medication Report Form and shall provide such treatment records to the stewards and/or the Racing Commission veterinarian(s) upon request and shall file it with Racing Commission Veterinarian not later than post time of the race for which the horse is entered. Any Medication Report Form filed with the Racing Commission veterinarian shall be confidential and its contents shall not be disclosed except in the course of an investigation of a possible violation of this rule or in a proceeding before the stewards or the Commission, or to the trainer or owner of record at the time of treatment. A timely and accurate filing of a Medication Report Form that is consistent with the analytical results of a positive test may be used as a mitigating factor in determining the nature and extent, if any, of a rules violation. Any veterinarian who falsifies a Medication Report Form or any treatment record or who fails to complete and file Medication Report Forms or to maintain other treatment records may be disciplined by the stewards or the Racing Commission.

The Veterinary Practice Act requires that Veterinarians CANNOT disclose medical records to third parties without prior written consent of the owner. This is a major sticking point and has been largely ignored in jurisdictions where Vet Reports are required. Such reports CANNOT violate other laws of the state. The commission is placing a veterinarian in the position of being in violation of a law or regulation regardless of what he/she does. As written, the Veterinary Practice Act would have to be revised to accept this practice.

The suggestion that these reports will be "confidential" except in the case of an investigation is problematic. Many jurisdictions (Maryland and Pennsylvania to name 2) have used the Vet Reports to decide what horses will be selected for testing. Clearly, in those jurisdictions, the racing officials have broken the confidentiality of the records prior to the running of the race. At a time when most positives are the result of inadvertent environmental contamination, this approach for the control of therapeutic medications unduly penalizes the honest horsemen and vets who are trying to follow the rules to the letter. Further, it penalizes horsemen and vets that are stabled on the premises, since it does not extend to all starters. Ohio is looking at a similar rule but is not requiring submission of a Vet Report. They are only requiring submission of records in the event of an investigation, which would be acceptable. An alternative regulation would be to specify that the Vet Report would be placed into an envelope sealed with evidence tape, and the seal only broken in the event of a positive test or breakdown.

~~48.4.a.~~ 48.5.a. The possession or use of a drug, substance or medication on the premises of a facility under the jurisdiction of the Commission for which a recognized analytical method has not been developed to detect and confirm the administration of such substance; or the use of which may endanger the health and welfare of the horse or endanger the safety of the rider; or the use of which may adversely affect the integrity of racing; or no generally accepted used in equine care exists.

This statement is overly broad. Most drugs, when they are first introduced, have no recognized analytical method. Further, many drugs that are FDA approved with appropriate recognized use, and that are

commonly used in racehorses, such as Adequan (polysulfated glucosaminoglycan), Legend (Hylauronic Acid), among many others, cannot be detected by recognized analytical methods. In addition, extending this regulation to "substances" will include glucosamine, chondroitin, as well as any number of nutritional supplements fall into the category of "no recognized analytical method." There is no recognized analytical method for the detection of hay, oats or water.

When these types of regulations are proposed, commissioners typically respond that the idea of banning hay, oats and water is absurd, and of course the regulation would never be applied in that manner. Unfortunately, as racing commissions turn over, vague and non-specific rules can be interpreted differently, and they must be as specific as possible when they are adopted.

Several of the clauses require further definition. "The use of which may endanger the health and welfare of the horse" can be applied to every drug or substance in the tackroom or on the vet truck. Common therapeutic medications used according to their labels can be associated with adverse reactions. For example, as a consequence of antibiotic-induced colitis, antibiotics are likely responsible for more deaths of horses than all illicit drug administrations combined. Every drug, vitamin or other substance used every day comes with its own level of risk, and every therapy must be implemented after a careful risk/benefit analysis by the vet in consultation with the trainer and/or owner.

The concept of "the use of which may adversely affect the integrity of racing" needs to be defined. There was a time when anabolic steroids were considered appropriate for the prevention of tying up in fillies, to stimulate appetite and improve healing and recovery from injury, particularly in geldings from whom we have removed their natural source of these hormones. Now, their use considered to adversely affect the integrity of racing, even when used in a therapeutic manner. "Integrity" is a moving target. This term has no clear definition, and what a veterinarian may consider appropriate care for the prevention of a serious medical condition, a regulator may consider race-fixing.

2. The RCI Prohibited List

When this list was proposed, both the HBPA and NAARV were vehemently opposed to the placement of ANY accepted therapeutic substances on a list entitled "Prohibited." The negative publicity potential is incredibly high: later in the same document there is a chart listing the conditions under which otherwise prohibited substances may be used. Imagine the average person reading a headline: "horse tests positive out of competition for a prohibited substance…no penalty applied." Honest horsemen have had their names drug through the mud for much less.

Our protests were ignored, and RCI adopted this list. On this list include "all anabolic agents," including clenbuterol and albuterol, both of which are also listed on the Controlled Therapeutic Medication Schedule. Stanozolol, Boldenone and Nandrolone, are all included even though they are also included on a separate list accompanied by a six month withdrawal for a therapeutic application (no scientific evidence to support a six month withdrawal). Listed on the prohibited list, alongside such things as "EPO and EPO-receptor antagonists" and "venoms and toxins" are Chorionic gonadotropin and Luteinizing Hormone in males, corticotropins (ACTH), substances with common therapeutic applications. Growth factors, commonly used in regenerative medicine for tendon and ligament repair are similarly banned. This list is a hodge-podge of substances taken mostly from the World Anti-Doping Agency (WADA) list, with no filter applied for applicability to horse racing. For example, almost all human drug testing is by urine testing, and WADA restricts the use of diuretics which act as masking agents. In horses, almost all testing is by plasma/serum testing, and diuretics are not masking in that case.

Nonetheless, this list of diuretics is retained by RCI on their prohibited list. Additionally, WADA does not consider thyroxine to impact performance, but the RCI added thyroxine to the prohibited list.

3. ARCI Restricted Therapeutic Use Chart

This chart includes substances also listed on the "Prohibited List" and the "Controlled Therapeutic Medication Schedule." We believe that all substances with a withdrawal guideline should be on the Controlled Therapeutic Medication Schedule and that this chart should simply not exist. We have issues with every substance on this chart. Specifically:

1. **ACTH**: commonly used for prevention of tying up, prevention of heat stroke, and for the treatment of stress. The requirement for a pre-treatment plan filing would create unnecessary paperwork, and based on the likelihood that it cannot be identified in the blood at abnormally high levels after about 30 min, this restriction would only penalize those stabled on the track. There is no evidence that ACTH in any therapeutic application could unfairly impact a race or competition, and requires special blood handling.
2. **Altrenogest**: The use of altrenogest (Regumate) in colts/stallions is banned at all times in or out of competition in this regulation. The most typical use of altrenogest out of competition is for behavior control in rank colts/stallions early in their training or during periods of lay up. The restriction of its use is a human safety issue. With the banning of anabolic steroids, many owners are reticent to geld their boys, wanting to wait until the last possible moment so that the boys can benefit maximally from their endogenous anabolic steroids. Among other benefits of anabolic steroids during training is increased bone density, so it actually protects them for the rest of their lives. Regumate in this group of horses is simply a human safety concern.
3. **Autologous Conditioned Plasma (IRAP), Platelet Rich Plasma and mesenchymal stem cells**: These substances have become commonplace injections for the purpose of joint, tendon and other local injections. The restriction of this substance in any way will set veterinary medicine back 50 years. There is no possible inappropriate use of this substance in the context of equine athletics. These are restricted in human sports because they aid in healing faster and better than permitting injuries to repair on their own, which is considered taking an unfair advantage. In horses, we have a responsibility to provide them the best possible medicine for healing and repair of injuries.
4. **Boldenone/Nandrolone/Stanozolol/testosterone**: These substances are restricted with a reporting requirement and a 6 month withdrawal. There is no scientific evidence that a 6 month restriction is necessary to prevent inappropriate use. In actuality, the current 2 month restriction on Stanozolol is more than enough to prevent inappropriate use. In order to provide performance enhancement, Stanozolol must be repeatedly administered over the course of months, and this application is simply not possible with the current 2 month restriction. Further, there are a number of therapeutic benefits to very small doses when used in conjunction with rest for joints and tendons, and a shorter restriction, such a 4 to 6 weeks would be appropriate for the use of this product at doses of 5 to 10 mg (25 to 50 times lower than the systemic dose).
5. **Chorionic gonadotropin/luteinizing hormone**: A 60 day withdrawal for a substance that does not increase testosterone for longer than 6 hours seems inappropriately long.
6. **Clenbuterol and Albuterol**: These substances are already on the Controlled Therapeutic Medication Schedule. NAARV is in support of a pre-treatment filing for these substances in the case of Quarter Horses only, because these substances have been abused to the point of injuring horses in the discipline of short sprints. All research evidence indicates that clenbuterol adversely affects performance in Thoroughbred and Standardbred racing, and a pre-treatment filing plan is unnecessary, because anyone using it in the same manner that it is used in Quarter Horses would

be hurting the horse's performance. Any changes to the manner in which these substances are used need to be included on the current Controlled Therapeutic Medication Schedule, and completely removed from the Prohibited Section entirely.

7. **Thyroxine**: Thyroxine gained its prominent position on this "Restricted Therapeutic Use Chart" as a consequence of two very notable events. The first was a string of breakdowns among Baffert trainees in Southern California, and the second was an embarrassing PETA video where assistant trainer Scott Blasi was seen adding Thyroxine to the feed of every horse in the Asmussen barn. Thyroxine was never implicated in any of the breakdowns in the Baffert cases, and instituting policy based on the uneducated opinion or misbehavior of a single lifelong assistant is wildly inappropriate. A percentage of racehorses have low circulating thyroxine and require hormone replacement to be normal, such that this requirement of gaining permission from the Commission in advance is inappropriate. There is no evidence that thyroxine supplementation is anything but therapeutic in those horses that need it. Even WADA does not ban or restrict the use of thyroxine. In jurisdictions, like West Virginia where there is no Equine Medical Director, there is no qualified individual to approve such requests. This leaves a horse with a medical condition untreated, while those with no knowledge of the horse, its inherent ability or its current condition determine if it should receive treatment. The NAARV would like to see the requirement for Thyroxine supplementation restricted to being on the prescription of a veterinarian. The requirement for a prescription for thyroxine to be limited in time further reflects the lack of knowledge on the part of those that crafted this rule. Just like the syndrome in humans, dogs and other species, horses low in thyroid hormone typically require Thyroxine supplementation in perpetuity.
8. **S0: Unapproved drugs**: Approximately half of the substances veterinarians carry on their trucks and administer or dispense daily are unapproved. Even some of the substances on the Controlled Therapeutic Medication Schedule are unapproved. The process of FDA approval is expensive and prolonged and most of the drugs that were in existence prior to changes in the approval process have never gone through that process. That does not mean that there are legal obstacles to their use, it simply means that such drugs that have been available for years prior to the initial implementation of the FDA approval process. Additionally, there are any number of compounded drugs, also legal, that have not undergone FDA approval. The requirement for veterinarians to submit a pre-treatment approval every five minutes on the backside of the racetrack places an extreme regulatory burden on the Commission, practitioners, horsemen and ultimately the owners, because the vets would have to hire additional personnel to handle the paperwork. The racing commission would similarly have to hire additional personnel to handle all of the pre-treatment review and approval. This regulation places the commission in the untenable position of determining the medical care of individual horses. The use of unapproved, but legal drugs or substances should be permissible if dispensed or administered by a licensed veterinarian.
9. **Diuretics**: The restriction of diuretics on the WADA prohibited list are for the purpose of preventing masking substances. Diuretics are used by human athletes to dilute banned substances in urine, preventing them from being detected. In adopting the WADA Prohibited List wholesale, RCI has ignored the differences between human and equine athletics. Horses are tested almost exclusively in blood, making this restriction irrelevant. NAARV would like to see all diuretics to be reported at the time of testing, similar to the Lasix provision. There are rare occasions that alternative diuretics might be required for therapeutic reasons, and the OOCT regulation should not be used to penalize horsemen and vets trying to do the right thing by their horses.

Most of the substances on the Prohibited List are reasonable restrictions, such as restrictions on designer anabolic steroids, EPO, EPO analogues, venoms and toxins. The expansion of this rule to include therapeutic substances, and including a "Restricted Therapeutic Use Chart" requiring pre-treatment approval places an unnecessary economic burden on horsemen, owners, vets and regulators alike. Further it is confusing to horsemen and the public have substances on both the "Controlled Therapeutic Medication Schedule" and the "Prohibited List." The "Restricted Therapeutic Use Chart" is redundant, because it explains circumstances under which otherwise "prohibited substances" can be used, similar to the "Controlled Therapeutic Medication Schedule." In fact, ALL substances are prohibited, except under specific circumstances. Therapeutic substances can be used as long as they are not administered on race day and do not test above a certain threshold in a post-race sample. Lasix (furosemide) can be used as long as it is listed in the program with an "L" and not administered under 4 hours. Any prohibited list for which OOCT is applied should contain ONLY substances which have no place as an intentional administration in a race horse at any time. Any expansion of this rule beyond these defined borders is inappropriate, unnecessary and places an unreasonable economic burden on an already struggling industry.

NAARV
NORTH AMERICAN ASSOCIATION OF RACETRACK VETERINARIANS

The National HBPA, Inc.

NATIONAL HEADQUARTERS
www.hbpa.org

870 Corporate Drive, Ste. 300 • Lexington, KY 40503
(859) 259-0451 – Telephone (859) 259-0452 – Facsimile
Email: racing@hbpa.org

July 18th, 2017

Hon. Jack Rossi, Chairman
Hon. Ken Lowe, Member
Hon. Anthony Figaretti, Member
Mr. Joe Moore, Executive Director
West Virginia Racing Commission
900 Pennsylvania Avenue, Suite 533
Charleston, WV 25302

Gentlemen:

The National HBPA (NHBPA) has represented the interests of thoroughbred owners and trainers racing in North America since 1940. The National HBPA and its Affiliates are tasked with protecting the general welfare of the racing industry, including the interests of horsemen, horsewomen, their employees, and the families of backstretch personnel. We represent close to 30,000 owners and trainers throughout the United States and Canada who are focused on many common goals: the betterment of current and future racing at all levels, safe and fair horse racing, and an unwavering commitment to the well-being of the equine athlete.

This letter shall serve as public comment and serve to echo the concerns also presented by the NHBPA Affiliate, Charles Town HBPA, Inc. ("CTHBPA") to the amendments to Thoroughbred Racing Rule 178 CSR 1 proposed by the West Virginia Racing Commission (the "Commission"). While the NHBPA wholeheartedly supports this and any other Commission's efforts to improve the integrity of thoroughbred racing, we feel some of the amendments recently proposed by the West Virginia Commission create significant legal and practical issues and should be reconsidered before adopting in their current form, as we expressed from our advisory seat to the Association of Racing Commissioners International (ARCI) Model Rules Committee.

Re: Proposed Amendments to Thoroughbred Racing Rule 178 CSR 1

Out-of-Competition Testing Rule

It is our understanding West Virginia currently authorizes the Commission to conduct out-of-competition testing of thoroughbred racehorses. The Commission currently seeks to make wholesale changes to this rule by adopting, in entirety, the new model out-of-competition testing rules drafted by the Association of Racing Commissioners International, which was not shaped with 100% approval from the ARCI Model Rules Committee. NHBPA as well as the CTHBPA supports out-of-competition testing as a means of detecting illegal substances, however, the proposed rules raise significant constitutional and practical concerns which are still being challenged. The Commission should strongly consider the entirety of the rule before adoption. The proposed rules are based on model rules that are in their infancy and have not been implemented, for any meaningful period of time, in any other jurisdiction. Given the substantial concerns outlined below, the NHBPA believes that prudence mitigates in favor of, at a minimum, delaying the implementation of the proposed rules until their efficacy and consequences can be more fully examined.

Issues and specific concerns with the proposed rule were addressed in a panel discussion with veterinary experts at the National HBPA convention. Excerpts of the panels remarks were published by the Blood Horse magazine and are available for review at http://www.bloodhorse.com/horse-racing/articles/220380/out-of-competition-rule-examined-at-hbpa-convention

It has been widely put forth as a concern and a caution that out-of-competition testing by the Commission implicates both the jurisdictional limits of the Commission's authority and the Fourth Amendment's protection against unreasonable search and seizure. The Commission has the plenary power to regulate virtually all aspects of horse racing, but only within the State of West Virginia. Thus, in order for the Commission to lawfully conduct a test of a horse which is not currently racing in West Virginia and/or is not physically located in West Virginia, there must be a sufficient nexus between the testing of that horse and the regulation of licensed horse racing in the State of West Virginia.

The most significant concern we find in the changes to the existing rule lies within the scope of medications and other substances subject to the out-of-competition testing regime. The existing rule limits "prohibited substances," for purposes of out-of-competition testing, to blood-doping agents, gene-doping agents, non-therapeutic steroids and growth hormones, and certain venoms. The inclusion of this discrete group of banned substances in the prohibited list was based on the recognition that trainers and veterinarians regularly use medications and other substances for legitimate therapeutic purposes (as evidenced by the need for withdrawal times and threshold levels) and that those permitted substances would almost certainly appear in any out-of-competition test. Under the proposed rule, however, out-of-competition testing includes all substances and medications included in the ARCI Prohibited List, including the very therapeutic medications regularly used by many trainers and veterinarians for the welfare of the horse.

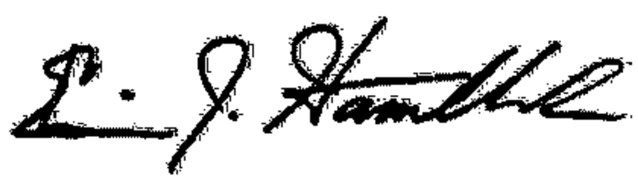
In order to preclude these medications from producing a positive out-of-competition test and subjecting the trainer/owner to the associated penalty, the horse's treating veterinarian would need to create and file a treatment plan with the Commission before administering these standard medications, even for horses who are months away from racing. This requirement would impose additional costs to the provision of veterinary services and could delay the provision of prompt treatment to a horse based on the 'need' to comply with additional administrative procedures prior to commencing treatment.

The stated purpose of out-of-competition testing is to prevent the use of performance-enhancing drugs that cannot be detected in a post-race test; the revised rule goes far beyond that purpose and creates a quagmire of paperwork through which trainers and veterinarians administering standard therapeutic medications to their horses. We understand changes of this sort may ultimately be beneficial, but it is a topic that should be examined not just by this Commission, but also by appropriate regulatory bodies overseeing the practice of veterinary medicine.

An additional significant concern we find in proposed amendments revolving around who the responsibility has been delegated to (or not to) in this proposal. It is important to note the proposed amendments found here, we understand have not been approved and adopted by the ARCI. As stated before, the NHBPA takes part in and offers comments to the ARCI Model Rules committee and it was due to objections from our group and others, which caused this previously proposed amendment to be tabled and not adopted as is implied here in referenced 51.1.b.1. Therefore, the NHBPA believes in this case as well, at a minimum, the Commission should delay the implementation of these proposed rules until their accuracy and consequences can be further scrutinized.

The NHBPA on behalf of our membership would like to thank the Commission for its review and consideration of these comments. As always, the NHBPA along with the CTHBPA are both available to discuss our comments with the Commission and to work with the Commission to craft language that accomplishes the Commission's stated goals, while protecting the legal rights of West Virginia's horsemen.

Sincerely,



Eric J. Hamelback
CEO, National HBPA

Mountaineer Park
Horsemen's Benevolent and Protective Association

July 19, 2017

WV Racing Commission
900 Pennsylvania Ave., Ste. 533
Charleston, WV 25302

Dear Commissioners,

The Mountaineer Park HBPA fully supports rule changes that will protect our sport from potential wrongdoing. We further applaud the commission for being proactive and for being recognized as a leader in regulatory reform. However, we think particularly in the case of the out of competition testing a careful and methodical approach is warranted.

We are in agreement regarding the comments made by the National HBPA. Our state is one of the few states that have out of competition testing. Out of competition testing was designed to prevent the use of performance enhancing drugs that were not detectable on race day. Testing for post-race levels of therapeutic drugs should not be part of this testing in any form. In addition, we are concerned with the Commission's ability to enter private property to implement this testing.

It is important to note that the ARCI Medication Committee did not adopt this amendment. They thought that the implementation of these amendments should be delayed until their accuracy, accountability and consequences can be further researched. We are recommending that the Commission consider a similar action.

We also suggest that further consideration be given to the rules in Veterinarian Practices and year-round medical administration records. This requirement for a Therapeutic, Evidenced Based Treatment Plan presents concerns for practicing veterinarians as well as the state veterinarians who have to review and track these records. At present time, there is only one practicing veterinarian on the track. The administrative costs associated with these changes will burden the state, veterinarian and the owner/trainer.

If a trainer is on a farm, a veterinarian will proscribe in bulk certain therapeutic medications. These first-aid type medications are a necessary part of properly and humanely caring for horses. Often, it is not possible to get a veterinarian to come to a farm to treat animals in an emergency.

We thank you for considering the comments of those who will be impacted by some of these overreaching changes.

Sincerely,

Jami Poole
President

P.O. BOX 486, NEWELL, WV 26050 – TELEPHONE (304) 387-9772 – FAX (304) 387-1925

July 19, 2017

Mr. Joe Moore
West Virginia Racing Commission
900 Pennsylvania Ave, Suite 533
Charleston, WV 25302

Sent via email

RE: Thoroughbred Racing Rule 178 CSR 1.24.3. Substance Abuse/Addiction.

Dear Mr. Moore,

I am writing on behalf of the Jockeys' Guild to express our concerns regarding drugs and alcohol testing as provided for under Thoroughbred Racing Rule 178 CSR 1.24.3. Substance Abuse/Addiction, which requires that all permit holders, including jockeys, be subject to random testing, as well as testing based upon reasonable suspicion. While we recognize that this specific rule wasn't addressed by the West Virginia Racing Commission Rules Committee, and that there are no proposed amendments, in light of recent events, we would respectfully request that the Commission consider reviewing this regulation.

Please understand that the safety is the ultimate goal and the Guild is not opposed to random drug and alcohol testing provided that the testing procedure is fair and equitable and follows established guidelines for such programs. Such procedures must insure that the testing is performed using the best practices so that the system protects both the due process rights of those who are being tested while insuring that the testing regimen which is adopted meets the highest industry standards for security and integrity.

West Virginia's regulation currently provides that enough specimen must be gathered to allow the permit holder to request for a split sample. However, the language is vague, and in practice this was not being done, nor was a split sample being maintained.

We have enclosed a suggestion proposal of language for consideration. Additionally, for further reference, the WVRC can refer to the West Virginia's Department of Transportation which has a comprehensive mandatory drug and alcohol screening program (including random testing) has been in effect for several years for employees in the transportation industry (truck and bus drivers, airplane pilots, railroad operators, and merchant ship officers). Although there are some differences, it is a very reasonable standard.

We believe that the proposed language as we have submitted will assure that the due process, laboratory standards, and security of the testing system will have adequate safeguards that will withstand legal challenge.

The Guild sincerely appreciates the Commission's consideration for the proposed changes. Please feel free to contact me via email at mcoleman@jockeysguild.com or in the office at (859)523-5625 if there are any questions or concerns regarding the foregoing proposal.

Sincerely,

Mindy L. Coleman,
Counsel

24.3. Substance Abuse/Addiction.

24.3 .a. All permit holders shall be deemed to be exercising the privileges of their permit, and shall be subject to the requirements of this subsection when engaged in activities that could affect the outcome of a race or diminish the conditions of safety or decorum required in restricted areas or other areas of the association grounds.

24.3.b. It shall be a violation to exercise the privileges granted by a permit issued by the Racing Commission if the permit holder:

24.3.b.1. Is engaged in the illegal sale or distribution of alcohol or a controlled substance;
24.3.b.2. Possesses, without a valid prescription, a controlled substance;
24.3.b.3. Is addicted, having been determined to be so by a professional evaluation, to alcohol or other drugs and is not engaged in an abstinence-based program of recovery acceptable to the Racing Commission;
24.3.b.4. Has in his or her possession on association grounds any equipment, products or materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled dangerous substance;
24.3.b.5. Refuses to submit to urine or drug testing, when notified that such testing is based on a random drug testing procedure; is based on reasonable suspicion that the person is using drugs or alcohol; or, is based on the permit holder's acting as if in an impaired condition; or
24.3.b.6. Presently has drugs (controlled substances) or alcohol in his or her body. With regard to alcohol, the results of a breathalyzer test showing a reading of more than .05 percent of alcohol in the blood shall be the criterion for a finding of alcohol present in the body. With regard to other controlled substances, the presence of the drug in any quantity measured by the testing instrument establishes the presence of the drug for purposes of this paragraph.

24.3.c. At its discretion, the Racing Commission and/or the stewards may conduct random drug testing, as well as testing based on reasonable suspicion, in order to ensure safety on the racetrack.

24.3.c.1. For purposes of this regulation, random drug testing should be accomplished by the taking of urine specimens. However, the Commission retains the right to direct the permit holder to submit to a drug test by methods including, but not limited to, blood, hair follicle, or skin.

24.3 .d. When conducted, random drug testing shall apply, equally, to all permit holders who are, at the time of the random testing, exercising the privileges of their permit in such ways as may affect the outcome of a race or diminish the conditions of safety or decorum required in restricted areas or other areas of the association grounds.

24.3.d.1. Random drug testing shall be conducted at the direction of the Executive Director on an unannounced basis before or after the beginning of a day's racing card. The names of all permit holders who are performing duties at the track on the day the random drug testing is conducted shall be placed in a secure container in which shall be in the custody of the supervising investigator. Prior to the first race of the program, the supervising investigator shall draw a designated number of names.
24.3.d.2. Representatives of the Jockeys' Guild and/or the Horsemen's Association may attend and witness the random selection of the names.
24.3.d.3. For race meetings with a duration of less than five months, random drug testing shall occur at least once during the course of the meeting. For race meetings with a duration of six months or more, random drug testing shall occur at least twice during the meeting. e. ~~No notice need be given as to the onset or cessation of random testing.~~

24.3.fe. When a specimen or sample is collected from a permit holder for testing under this subsection, a sufficient sample shall be collected, when possible, to ensure a quantity for a split sample so that a permit holder may request an independent analysis of the specimen or sample.

24.3.e.1. Each urine sample received from a permit holder shall be divided into two (2) separate parts. One portion shall be designated as the "official permit holder test sample" and shall be tested by a Commission approved official laboratory. The remaining portion of the specimen shall be known as the "permit holder

split sample" and shall be available for testing at a Commission approved independent laboratory upon the request of the individual who provided the specimen sample. All specimens taken by representatives of the Commission are under the jurisdiction of and shall remain the property of the Commission at all times.

24.3.~~h~~f. All costs of initial testing under this subsection shall be at the expense of the racing association. However, should the results of a test come back positive, the costs of the test may be assessed against the permit holder, upon approval by the stewards. All costs for the testing of a specimen or sample portion made available for the permit holder shall be the financial responsibility of the requesting person.

24.3.g. For purposes of this regulation "Commission approved official laboratory" and "Commission approved independent laboratory" means a laboratory certified by the United States Department of Health and Human Services under the National Laboratory Certification Program as meeting the minimum standards to engage in drug test for federal agencies. A list of certified laboratories shall be available at the West Virginia Racing Commission headquarters and shall be provided to permit holders upon request.

24.3.h. Each specimen shall be tested for the following prohibited drugs or classes of drugs:

24.3.h.1. Random Samples: 1. Marijuana metabolites. 2. Cocaine metabolites. 3. Amphetamines. 4. Opiate metabolites. 5. Phencyclidine (PCP).

24.3.h.2. In certain reasonable suspicion testing scenarios or when it is determined that additional testing is necessary, permit holders may be required to provide an additional urine sample that will be analyzed using a Substance Abuse and Mental Health Services Administration (SAMHSA) 12 Panel Drug Screening.

24.3.i. The Commission approved official laboratory shall immediately and confidentially report to the Executive Director or his designee any positive finding for any of the drugs or classes of drugs described in subsection 24.3.g.1 through 24.3.g.5. of this regulation. The Commission approved official laboratory shall also transmit a confidential written report of the finding to the Executive Director within five working days after the notification is made.

24.3.j. In the event the Executive Director or his designee is notified of a positive finding by the Commission approved official laboratory, the Executive Director or his designee shall notify the Stewards. The Stewards shall confidentially and personally notify the permit holder. Furthermore, the permit holder shall be notified of his or her right to request a split sample as provided for within this regulation. This notice does not exempt proper service of any notice of hearing requirements as provided for in any other section.

24.3.k. In the event of a positive finding of a test, his or her permit may be summarily suspended at the discretion of the stewards and/or may be subject to other disciplinary action in accordance with this rule.

24.3.l. The permit holder shall have 72 hours from the date he or she is notified to request that the "permit holder split sample" of the "official permit holder sample" that was found to contain a prohibited drug or class of drug, be tested by a Commission approved independent laboratory.

24.3.l. 1. If the permit holder elects to have the "permit holder split sample" be tested he/she shall comply with the following procedures:

24.3.l.1.a. The request shall be submitted on WVRC Form ___ "Authorization to Release Permit Holder Split Sample" which is hereby incorporated by reference. WVRC Form # ___ shall be available at all WVRC offices and the WVRC website.

24.3.l.1.b. The permit holder shall be responsible for all charges and costs incurred in transporting and testing the "permit holder split sample". By signing WVRC Form # ____ the permit holder certifies that he or she has made arrangements for payment to the designated independent Commission approved laboratory for laboratory testing services.

24.3.l.1.c. Verification of payment for costs incurred for the permit holder split sample must be received by the WVRC within 5 working days from the date of the submission of the WVRC Form # ____. If such verification is not received, the permit holder split sample will not be released or shipped to the designated Commission approved independent laboratory and the permit holder will have relinquished his or her right to have the split sample tested.

24.3.1. 2. Upon receipt of a valid request submitted on WVRC Form # ____, "Authorization to Release Permit Holder Split Sample", the Racing Commission and/or the stewards shall provide for a secure chain of custody for the sample to be made available to the permit holder.

24.3.1.3. A permit holder who fails to request the testing of the "permit holder split sample" in accordance with the procedures listed herein shall be deemed to have waived his or her right to have the split sample tested.

24.3.1.4. If the findings by the Commission approved independent laboratory fail to confirm the findings of a prohibited drug or class of drug as reported by the Commission approved official laboratory, it shall be presumed that a prohibited drug or class of drug was not present in the official permit holder test sample.

24.3.m. Unless or until the Commission files an official complaint or accusation, results of the official permit holder test sample and the permit holder split sample shall be, and shall remain confidential. No test results may be released to any person or organization unless such release is explicitly required under this regulation. Only the Executive Director or the Executive Director's designee, the Board, and permit holder shall receive the results.

24.3.in. If a permit holder refuses to submit to urine or drug testing under this ~~subsection or if a permit holder tests positive,~~ his or her permit may be summarily suspended at the discretion of the stewards and/or may be subject to other disciplinary action in accordance with this rule. In the event that a permit holder is physically unable to provide a urine sample, the Stewards may allow for the permit holder to submit to another method of drug testing including, but not limited to, blood, hair follicle or skin.

24.3.jo. A permit holder who is a first time violator under this subsection shall be required to undergo a professional assessment before the stewards and/or the Racing Commission to determine whether or not the permit holder's condition is such that he or she may hold a permit and participate in racing. In the discretion of the stewards and/or the Racing Commission, a first time violator may be required to produce a negative test result; may be required to submit to further testing; and/or may be required to successfully complete a certified drug/alcohol rehabilitation program as a condition of holding a permit and participation in racing.

24.3.kp. A permit holder who is a second time violator under this subsection shall be subject to suspension. The permit holder may not apply for reinstatement of his or her permit until such time as he or she has successfully completed a certified drug/alcohol rehabilitation program and has otherwise satisfied the Racing Commission and/or the stewards that he or she is fit to hold a permit.

24.3.lq. A permit holder who is a third time violator under this subsection may be subject to revocation and may be deemed ineligible to apply for reinstatement of his or her permit for a period of time determined by the stewards and/or the Racing Commission. The Racing Commission and/or the stewards may determine what, if any, conditions a third time violator is required to meet in order to be considered for reinstatement of his or her permit.