

RESPONSE TO PUBLIC COMMENTS 178 CSR 1 THOROUGHBRED RACING

On June 10, 2019, the West Virginia Racing Commission put proposed amendments out for comment that pertained to the proposed adoption of several Model Rules promulgated by the Association of Racing Commissioners International (RCI). West Virginia is a member of RCI and is a voting member of the Board of Directors of RCI. The public comment period for the West Virginia Racing Commission's proposal ended on July 10, 2019. The Racing Commission received public comments from Jami Poole, the President of the Mountaineer Park HBPA, and James F. Miller, President of the Charles Town HBPA. A copy of the public comments is attached to and immediately follows this response. The Racing Commission held a public meeting on July 16, 2019 to consider the public comments. At that meeting, the Commission voted to final file the rule for legislative consideration without any changes to the Model Rules that are proposed to be adopted into West Virginia's rule.

The following is a summary of each of the proposed Model Rules that the Racing Commission seeks to amend into its rule; a description of any public comments received on each rule; and, a response to such public comments:

1. The adoption of the most recent Version (Version 4.0/December 2018) of the ARCI Endogenous, Dietary or Environmental Substances Schedule which adds Morphine to the schedule. West Virginia currently has Version 3.0 of this Schedule in its rule. This schedule lists certain substances that may be found in a horse in post-race testing that may be attributable to human contamination or other inadvertent exposure. The Schedule provides thresholds for such substances so that if a horse tests positive for one of the substances, the Commission can evaluate whether or not the level found in the horse is consistent with inadvertent exposure or with intentional administration. Having the most current Schedule in West Virginia's rule is important to the welfare and safety of horses and to effective regulation of the sport. The Schedule allows the Commission a framework within which to evaluate and punish (if appropriate) positives for these substances. The Schedule is proposed to be adopted by reference in Table 178-1 G to West Virginia's rule.

The Commission did not receive any public comments on this proposed amendment.

2. To adopt the most recent Version (Version 14.0/January 2019) of the ARCI Uniform Classification Guidelines for Foreign Substances, which adds numerous items to this comprehensive list of foreign substances that may be found in a horse in post-race or out of competition testing. West Virginia currently has Version 13.2 of this list in its rule. This list categorizes substances depending upon whether they are therapeutic or prohibited for purposes of determining penalties for drug positives. ARCI updates this list regularly based upon input from equine science experts. Having the most recent version of this list in West Virginia's rule is important to the welfare and safety of horses and to effective regulation of the sport. The list allows the Commission a framework within which to evaluate and punish (if appropriate) positives for all substances. The list is proposed to be adopted by reference in Table 178-1 D to West Virginia's rule.

The Commission did not receive any public comments on this proposed amendment.

3. To amend the Penalty Guidelines contained in Table 178-1 E of the rule so that they match and conform to the ARCI Model Rule Penalty Guidelines. The proposed changes are relatively minor as reflected in the strike-through and underline format. These guidelines provide a framework within which the Racing Commission may determine the appropriate penalty for post-race drug positives in horses competing on the racetracks. The guidelines set forth a range of penalties depending upon the nature of the drug and whether the permit holder has past offenses. It is important for West Virginia to have the most current penalty guidelines for drug positives in horses to protect equine welfare and to protect the integrity of the sport.

The Commission did not receive any public comments on this proposed amendment.

4. To amend West Virginia's void claim rule to conform to the ARCI Model Rule. The proposed changes are reflected in underline format in section 33.2 of the Rule. The amendments would allow any person who claims a horse in a claiming race the discretion to void the claim if the horse is vanned off of the track due to injury at the direction of a State Veterinarian or if the horse is determined to be lame by a State Veterinarian. The purpose of updating this rule to match the Model Rule is to disincentivize persons from racing horses in claiming races that may not be fit to race and that, therefore, end up injured during the running of a claiming race. Adopting these amendments is an equine welfare issue and a means to give some reasonable protection to persons who seek to claim horses.

The Commission received a public comment from the Mountaineer HBPA in opposition to this proposed amendment and from the Charles Town HBPA in support of the amendment (but with a suggested word change). The Mountaineer HBPA commented that the proposal does not protect the welfare of the horse and the Charles Town HBPA commented that it did protect the welfare of the horse.

Response: The proposed rule is an RCI Model Rule that went through the extensive deliberative process, that includes racing stakeholder input, at the national level. Moreover, the very survival of thoroughbred racing in the United States has been put into question due to equine welfare issues that have most recently played out at Santa Anita Racetrack in California where thirty (30) horses died in a relatively short period of time during the course of the track's most recent race meet. These horse deaths and other incidents have literally rattled the thoroughbred racing industry in the United States. Federal legislation has been introduced that would strip state racing commissions of the authority to regulate certain aspects of racing as a condition of the states being able to simulcast their races across state lines pursuant to the Interstate Horseracing Act, a federal law. It is imperative that West Virginia and other racing jurisdictions enact uniform rules that err on the side of the protection of animal welfare. Race types form a hierarchy in terms of the quality of horse they attract and claiming races tend to fall at the bottom of that hierarchy. Disincentivising horsemen from racing unsound horses in claiming races that have a likelihood of being injured and then becoming the responsibility of an innocent claimant, is the purpose of the adoption of this rule amendment. Adoption of this rule would also put power into the hands of persons who seek to claim a horse to make a decision whether or not to void a claim if the horse is vanned off the track or is determined to be lame by the State Veterinarian. This rule protects claimants and protects the horse. Moreover, racing customers do not want to come to the track and see horses injured on the track. Attracting

and keeping racing customers is critical to the survival of the industry, revenues, and the livelihoods of racing constituents. Adoption of this void claim Model Rule is one more tool to ensure that racing remains an attractive activity for customers who want to come to the racetrack

5. To amend West Virginia's out of competition testing rule and veterinary practices rule to conform to the ARCI Model Rule. The proposed changes are reflected in strike-through and underline format in sections 49.14, 48.2, 48.4, 48.5.f., and through the adoption by reference of Table 178-1 I and Table 178-1 J. These changes seek to adopt the most current ARCI Model Rules on out of competition testing of horses and veterinary practices which are important to the integrity of the sport and to equine welfare. West Virginia participates in a Mid-Atlantic racing regulators group that includes Pennsylvania, Maryland, Delaware, New York, New Jersey, and Virginia. In order for West Virginia to remain consistent with its Mid-Atlantic colleagues, adoption of this rule is important. The proposed amendments would more comprehensively regulate and govern out of competition testing and would ensure that veterinary care of horses is governed by the best interests of the horse.

The Charles Town HBPA commented in opposition to these rule amendments.

Response: It should be noted that the National HBPA, of which the Charles Town HBPA is an affiliate, supported these Model Rules when they were enacted at the national level over three years ago. Adoption of these rules is necessary if West Virginia's thoroughbred racetracks are to attain National Thoroughbred Racing Association (NTRA) Safety and Integrity Accreditation, which both the horsemen and the racetracks have consistently supported. Indeed, the Commission voted several years ago to require West Virginia's thoroughbred racetracks to attain such accreditation and the racetracks have made a substantial investment of time and money to move forward with accreditation. Failure to adopt these critical Model Rules continues to be an impediment to achieving that accreditation. Experts at the highest levels of thoroughbred racing, including equine testing experts, equine veterinarians, racing lawyers, etc., participated in the formulation of these Model Rules. The Racing Commission is satisfied that concerns expressed by the Charles Town HBPA have been addressed at the national level before this rule was adopted by RCI. Moreover, the rule has already been implemented in multiple racing states.

6. To amend West Virginia's rule pertaining to the Veterinarian's List to conform to the ARCI Model Rule. The proposed changes are reflected in strike-through and underline format in sections 41.2.g., 52.3.c., and 52.3.d.3. The changes would provide that horses placed on the Veterinarian's List due to infirmity and other conditions would be required to remain on that list and be ineligible to compete for a minimum of seven days. West Virginia's rule currently requires a five day rest period. The changes would also require horses placed on the list due to infirmity to undergo drug testing before being cleared to compete at the end of the rest period. Adoption of these proposals is important to equine welfare.

The Charles Town HBPA commented in opposition to this rule amendment.

Response: This Model Rule is another rule that is important to the effort for West Virginia's thoroughbred racetracks to attain NTRA Safety and Integrity Accreditation. Simply put, this rule

errs on the side of ensuring that horses have sufficient rest periods before returning to racing after injury or other infirmity. As noted above, the recent horse deaths at Santa Anita Racetrack, which have shaken the industry, have brought into the spotlight concerns about allowing horses to run back too soon after injury or infirmity. This rule changes brings West Virginia in line with the Model Rule and errs on the side of animal welfare.

7. To amend West Virginia's rule pertaining to Furosemide to conform to the ARCI Model Rule. The proposed changes are reflected in underline format at sections 49.7.e.10.A. and 49.7.e.10.B. The proposed changes would add specifications for post-race test results for this drug which is administered to horses to treat exercise-induced bleeding in the lungs. Adoption of these changes is important to equine welfare and will allow the Commission to adequately evaluate post-race test results for this drug.

The Commission did not receive any public comments on this proposed amendment.

8. To amend West Virginia's rule pertaining to jockey physical examinations to conform to the ARCI Model Rule. The proposed changes are reflected in underline format at section 28.1.b. The proposed changes require that when a jockey has a physical exam for fitness for duty, that it include a baseline concussion test. West Virginia adopted ARCI's Model Rule on jockey concussion protocols during the 2019 legislative session (*see* sections 22.11 and Table 178-1 H). ARCI added the baseline concussion test into the Model Rule after West Virginia adopted these provisions. Because of timing, we were unable to get the baseline concussion test into our rule during the 2019 rule-making cycle. In order to keep our rule current and to ensure the safety of jockeys, adoption of this most recent Model Rule is desirable.

The Commission did not receive any public comments on this proposed amendment.

Jennifer Johnson- 1st VP
J. Michael Baird -2nd VP

Jami Poole
President

Jana Tetrault
Executive Director



OWNER DIRECTORS

Jeanette McIntosh
Dennis Behrmann
Annette McCoy
Louise Poole

TRAINER DIRECTORS

Eddie Clouston
John W. Baird
Danny Bird
David Trehame

Sent Via Fax

July 5, 2019

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

Dear Commissioners,

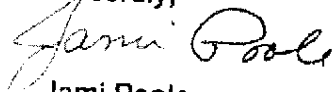
We are writing in regards to the proposed amendments to the Thoroughbred Racing Rules that are available for public comment. The Mountaineer Park HBPA strongly supports all initiatives that will ensure the safety and welfare of the horse and rider and the integrity of the racing industry.

The Mountaineer Park HBPA does not believe that the rule change referenced in 178-1-33.2 under Part 6. Claiming Racing, will ensure the integrity of thoroughbred racing and the safety and welfare of our horses and riders. Extending insurance for the claimant does not ensure the safety or integrity in any manner. The rules of racing are clear that the trainer has complete responsibility in conducting his or her business. The concept of claiming races is, and has always been, that it is the trainer's responsibility to research a horse before placing a claim. The claim in and of itself is a risk that is taken in order to "purchase" the horse at a set price. Horses who race in a claiming race are often sold for more money than the claim price in private transactions.

While we supported the previous rule that provided *that a claim is voided if the horse suffers a fatality during the running of the race, dies or is euthanized by a racing commission veterinarian on the race course or an adjacent area*, we strongly feel that this current proposal defeats the intent of claiming races and offers no protection to the horse or rider. Further, this puts an unrealistic burden and responsibility on the Racing Commission Veterinarian during the races. With a goal to promote integrity and safety, a rule that requires claimed horses go to the test barn would help to ensure the integrity of the sport by confirming the horse is free of medications which could result in a disqualification for the new owner and trainer.

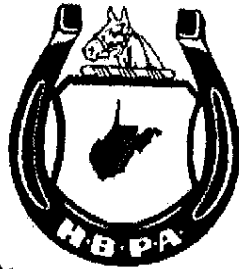
We applaud the West Virginia Racing Commission for its efforts to ensure that our industry is adhering to the latest rules and regulations in regards to medication and closely follows the ARCI proposed rule changes. It is our intention to support the integrity of our industry and the safety of all participants.

Sincerely,

A handwritten signature in cursive script that reads "Jami Poole".

Jami Poole
President

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



CHARLES TOWN

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC.

PO BOX 581

CHARLES TOWN, WV 25414

PHONE (304) 725-1535 FAX (304) 728-2113

E-MAIL ncatignani@cthbpa.com

VIA EMAIL

July 10, 2019

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

Re: Proposed Amendments to Thoroughbred Rule of Racing §178 CSR 1

This letter shall serve as the public comment of the Charles Town HBPA, Inc. ("CTHBPA") to the amendments to the Thoroughbred Racing Rule §178 CSR 1 proposed by the West Virginia Racing Commission (the "Commission"). CTHBPA is a member affiliate of the National HBPA 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 modification come 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 amended rule 33.2 Voided Claim

We are in favor of the proposed amended rule with the request that the last words of the amendment "while on the racetrack for that race" are deleted. We think that this affords additional protection to the horse and increases the perception of integrity in racing.

Proposed amended 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 opposes modification of the current rule from five days to seven days.

Proposed 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 is 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 symptom 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 - 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 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.¹ 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 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).² 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*, 303F.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 biologic 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

¹ 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>

² In fact, § 178-1-1.1, which governs the scope of the thoroughbred rules, specifically provides that "[this rule [in which the out-of-competition testing rules are included] regulates the conduct of thoroughbred racing in this state" (emphasis added).

that such biological materials "enhanced" 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.³ These horses are not subject to the plenary 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.⁴ 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.⁵

³ 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.

⁴ 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.

⁵ 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.

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 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.⁶ 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.⁷ 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.

⁶ 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.

⁷ "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 racehorse 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).

Current and Proposed Amended Rule 52.3 - Veterinarian's List: Specific Conditions

By virtue of 52.3 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 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."

Proposed Amended Rule 52.3.c

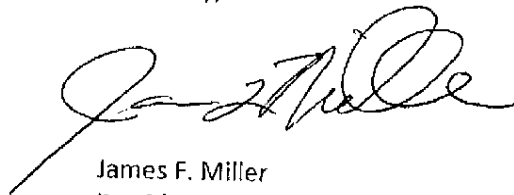
To be consistent with our request for rule 41.2, CTHBPA opposes modification of the current rule from five days to seven days on the veterinarians' list.

Proposed Amended Rule 52.3.d.3

We are opposed to this rule because it is consistent with our objection to the proposed out of competition rule.

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,

A handwritten signature in black ink, appearing to read "James F. Miller", written in a cursive style.

James F. Miller
President