Analysis of S.4547 - Horseracing Integrity and Safety Act of 2020

Fixing the Kitchen by Building a New House

Prepared for the Association of Racing Commissioners International.

Introduction

Following a January, 2020 column in the Washington Post calling for the prohibition of horse racing and months of continued equine fatalities, Senate Majority Leader Mitch McConnell became personally involved in a well intentioned effort to save the sport and develop a compromise, consensus piece of federal legislation intended to do so. Unfortunately the parties Senator McConnell found necessary to compromise were limited to some thoroughbred racing interests, particularly Churchill Downs and The Jockey Club with lesser involvement to varying degrees from some NTRA Board Members and Jockey Club allies in the political lobbying and advocacy group the Coalition for Horse Racing Integrity.

Deliberately excluded from these discussions were representatives of the other Breed Registries, the existing state based regulatory network, and national organizations representing racetracks, horsemen, veterinarians, and bettors.

As of this writing, the House of Representatives has already passed this legislation. In the Senate, it is expected that Senator McConnell will seek to pass this bill before the end of the year.. This bill could become federal law despite there not being a hearing or any understanding as to the costs to be imposed on the racing industry.

The change required by this bill is enormous and given the long standing complaints about state racing commissions, it can best be described that rather than fix specific problems, it just builds an entire new system effectively discarding the current one. In others words, to fix the kitchen, you burn the whole house down and build a new one.

A Mixed Bag and Unanswered Questions

Passage of S.4547 - Horseracing Integrity and Safety Act of 2020 - will achieve some long sought improvements that will result in uniform medication and anti-doping rules and laboratory testing using common screening limits. It also creates a multi-jurisdictional investigative and enforcement entity.

The legislation empowers that entity to take of control of the execution of every aspect of anti-doping and medication rule enforcement with an assumption that existing state programs will continue but at the direction of the enforcement vendor envisioned to be the United States Anti-Doping Agency (USADA).

States are required to fund any extra mandated costs as well as their portion of costs associated with the newly formed Authority as well as its Enforcement vendor. If a state decides to turn their entire existing program over to the new Authority, they may do so and the Authority has broad taxing authority to require payments from racetracks, owners, trainers, breeders, and veterinarians.

The funding limitations that have plagued every State Racing Commission are addressed with this legislation where spending limits are self determined and there is no outside limitation on costs that can be imposed.

As the sponsors have not released a projected baseline budget for expected costs associated with the Authority or its Enforcement Agency, it is impossible to assess the economic impact of this bill on the industry as a whole or segments such as small or midsized racetracks. The lack of the specific financial impact is an unanswered question that causes some to withhold support for this legislation as they may ultimately be asked to pay. Senator McConnell and the proponents should disclose to the industry all anticipated costs.

Achieving additional uniformity, in and of itself, is a positive for those who own and race horses in multiple jurisdictions guaranteeing a degree of consistency many believe is not currently there despite widespread adherence to the Model Rules standards of the ARCI.

That adherence is not totally uniform and the result of this bill will address that by requiring adherence to new standards yet to be developed.

The new Authority will be responsible for developing testing laboratory standards and accrediting laboratories. In the US, laboratory accreditation by the Racing Medication and Testing Consortium is a current requirement of most states. It is unclear why this program is being tossed aside, perhaps because the RMTC is not accredited to be accrediting laboratories and the new Authority plans to obtain such accreditation.

The ARCI has raised the need to expand regulatory jurisdiction over horses not currently regulated. This bill does that but at a point much later than the ARCI has called for.

Uniformity and Standardization.

S.4547 will result in total uniformity of doping and medication rules for thoroughbred racing as well as uniform testing by the use of common screening limits.

Testing and enforcement strategies will be uniform as will the safety standards required of racetracks.

Adjudications will be handled by the Enforcement Agency and appeals will be heard by the Federal Trade Commission.

Penalties for violations will be determined by guidelines adopted by the new Authority and are envisioned to be the same regardless of regional differences in the quality of horses or the ability of participants to absorb penalties for a violation. A phenylbutazone violation at Horseman's Park in Omaha will be punished the same as one at Keeneland in Kentucky.

Bill Authorizes Strict Control of Medications in Training

The new authority will be able to impose strict controls on the use of any therapeutic medications administered to a "covered horse." This effectively sets the stage for a program that could require a veterinarian to receive prior permission before treating a "covered" horse with a prescription medication.

S.4547 grants the new Authority power to control all substances administered to horses under its jurisdiction. Under the proposal, a "covered horse" comes under the jurisdiction of the new authority after its first timed workout at a racetrack.

The authority could, on its own initiative and decision, put in place a system to control what some believe is the overuse or misuse of therapeutic medications in the care and preparation of horses intended to race. Such a system, if implemented, would parallel the "therapeutic use exemption" program in human sport. Under the requirements of the World Anti-Doping Agency code, advance permission must be obtained before a controlled substance is administered to an athlete in training or competition.

Whether it will actually do so, the timing of such a change, or how it would work is not yet known.

It is not expected that the new Authority would depart from current ARCI Model Rules or IFHA standards that prohibit such drugs to be present in the horse when it races and the bill language appears to preclude that possibility.

Given the number of racehorses potentially regulated by the new Authority, such a program would require additional resources than those currently available in the regulatory network in order to review such applications.

Current State laws do not authorize the Racing Commissions to regulate the practice of veterinary medicine. Despite that, there has been a trend within the ARCI and the RMTC to require commission notification of certain treatments and in some limited circumstances

advance approval. S.4547 grants broad powers to the new Authority in the area of substances and "covered horses."

In July 2019, the ARCI proposed a private regulatory scheme using existing breed registry authority to require submission of all veterinary treatment records, including the diagnosis required for treatments, of all intended racehorses from birth forward. These records would be electronically reviewed to "red flag" horses in need of greater monitoring in order to help regulatory veterinarians assess whether a horse is high risk and should be excluded from competition.

As S.4547 has a greater focus on anti-doping, it does not require such a system. The bill does effectively put the actual horse under the regulatory authority of the new Authority at a uniform and consistent point in its career, eliminating inconsistencies that currently exist in state based statutes and rules.

It remains unclear whether the Authority will require the submission of all veterinary records or will fall short of what the ARCI had asked the Jockey Club to require in 2019.

Regulation of Horses and Unregulated Industry Segments

In December 2017 the ARCI, citing the widespread use of drugs on yearlings and two years olds that may result in improper bone development, called for the regulation of those portions of the race horse industry not under government or private regulatory jurisdiction. The association did not express a preference of whether these horses should be regulated by a public or private national entity.

The association's Chair Jeff Colliton, Chair of the Washington State Horse Racing Commission, said at that time "If we care about our horses and the integrity of the sport, the racing industry can no longer turn a blind eye to the need to address this shortcoming." This need was cited at two Congressional hearings on the then proposed Horseracing Integrity Act, which has been supplanted with S.4547.[1]

[1] There have been no hearings on S.4547 in either the House or Senate as of this writing.

S.4547 falls short of addressing this gap and horses beyond the reach of a regulatory authority remain a major concern for a sport plagued by catastrophic equine breakdowns. This regulatory gap was cited in Congressional testimony by the ARCI representative as a vulnerability that regulators believe puts horses at greater risk of breakdowns later in their racing career.

The McConnell proposal does clarify and expand the regulation of the actual horse, and this should be viewed as a positive in that it clarifies the issue nationally and does close some of the gap. This clarification will eliminate an obstacle that has stood in the way or limited out-of-competition anti-doping testing in some jurisdictions and enable the new Authority to regulate and control the administration of any medications to horses under its jurisdiction. The proposal puts all "covered horses" under the regulatory authority after the first timed workout at a racetrack.

But the non-regulation of young horses remains an issue. In 2017, the ARCI Equine Welfare Committee, chaired by noted equine researcher Dr. Corrine Sweeney, a Pennsylvania Racing Commission Member, raised concerns about the use of bisphosphonate drugs in young horses amid reports of their widespread use on yearlings and two-year olds to treat pain or get them ready for the auction ring. S.4547 does require the disclosure to purchasers of horses treated with bisphosphonates, but again, this falls short of what the ARCI believes necessary.

Veterinary experts have noted a concern that the bones of young horses treated with bisphosphonates may falsely appear to be fully developed when subjected to a radiograph prior to entering the auction ring. This can affect price. The administration of such drugs is legal under Federal Law, but this underscores a need to regulate how young horses intended for the stress of a racing career are cared for and managed.

S.4547 will not address this need as presently written.

Transition of State Anti-Doping and Medication Rule Enforcement

As with its predecessor, the Tonko-Barr Horseracing integrity Act, the sponsor and proponents of S.4547 assume that the extensive existing infrastructure of current anti-doping and medication rule enforcement state based programs will largely remain in place and available to be utilized by the new federally sanctioned private authority. Existing funding streams are assumed to remain available.

S.4547 assumes that most State programs will continue and be expanded to meet the mandates of the Authority. The bill requires States absorb any increased programmatic costs as well as assessments to pay a share of the Authority and its Enforcement vendor. There is an assumption that once assessed on a State Racing Commission, industry assessments could be levied in order to pay the Authority's bill, using state commissions as collection agencies.

These assumptions may prove not to be valid or workable in many states. In fact, the newly proposed Horseracing Integrity and Safety Act of 2020 (S.4547) may actually provide an incentive for States to defund existing anti-doping and medication rule enforcement programs.

COVID-19 has economically devastated many state budgets and the additional resources just may not be there to improve upon the existing anti-doping and medication enforcement program infrastructure to comply with S.4547.

It is not unreasonable to expect that a State Budget Director or Legislative Committee will look at this new law and question why the state needs to continue paying for the existing program, new unfunded mandates, and a new federal authority as well as it's contracted enforcement agency. S.4547 allows the state to off load their current program and have the federally dictated system pay, and there will be an economic incentive to do that.

At that point racetracks, owners, trainers, breeders, and veterinarians may be assessed costs to replace the lost state investment and pay for the additional two entities envisioned by the bill.

Depending on the state, the local racing industry may be required to continue paying all current state assessments and taxes only to discover that they now must pay newly levied assessments to pay for the now federally mandated privatized program, whether those assessments are levied by the State or the Authority.

Assuming that state budget deficits will prevent any industry specific state tax cuts, the racetracks, owners, trainers, breeders, and veterinarians in the following states *(partial list)* are potentially exposed to paying again should their state program be defunded or shifted to the newly created Authority:

Illinois	Colorado
Michigan	Florida
Oregon	Arizona
Massachusetts	Nebraska
Virginia	Washington
Indiana	New Mexico
Wyoming	

Some states have the ability to directly bill racetracks for their program. These states may continue to operate their existing program and simply forward to the racetracks an enhanced bill for the current program, additional mandates and the assessment for the two new entities. These jurisdictions include:

New Jersey	Texas
Kentucky	Delaware
Iowa	Oklahoma
Massachusetts	New York* (see below)
Virginia	Maryland* (see below)
West Virginia	Minnesota

In New York State general fund monies are used to pay for the drug testing enforcement program and shortfalls are recouped from a regulator determined industry assessment on racetracks and owners. Given New York's severe post virus financial needs for the foreseeable future, it would be possible for the state to cut funds for drug testing and allow the commission to impose fees on tracks and owners to pay for the shortfall and any additional costs imposed by S.4547.

If that were to happen or should the State hand the program off, the prospect for an industry specific tax cut would be slim and the industry would be totally required to make up the loss of state investment, the additional mandates, as well as continuing to pay all existing state levies.

In Maryland, only certain costs can be forwarded to the tracks and additional mandates may require legislation in order for additional mandates to be passed through.

It is not unreasonable to expect that the decision of whether a state continues to fund a state operated program, fully or partly, will not be for the Commission to decide. Such decisions are expected to be made up-line in the offices of the Governor, State Budget Director, or Legislative Budget committees.

There are other complications that may alter the envisioned implementation scheme. Some state agencies may be precluded from offering services to a private entity for a fee. Likewise, if reimbursement payments to the state racing commission are required to be deposited in the State General Fund, the commission may then be required to seek an appropriation to transfer those funds to the agency so its costs can be recouped.

These matters may prove to be operational considerations that might preclude the possibility that a state agency could provide post race or out of competition sample collection, laboratory testing, investigative legwork, or even adjudication should the Authority wish to utilize significant portions of the existing infrastructure.

Implementation of S.4547 will not be a "one size fits all" proposition and will need to be addressed on a state by state basis with the new Authority.

Complicating this issue is the lack of specifics as to what the new mandates and actual costs may be. While state racing commissions have struggled — often unsuccessfully — with securing desired funding for out of competition testing, expanded drug testing, additional investigative staff and surveillance equipment, S.4547 provides a way to sidestep that issue by giving the new Authority a virtual "blank check" to have its Enforcement Agency do whatever it requires.

Without specifics one cannot assess whether this funding mechanism will prove to be a net positive for the industry or an onerous burden that an already struggling sport is incapable of bearing.

The Association of Racing Commissioners International (ARCI) plans to work to ensure that the transition from the current system to the new system is as smooth as possible. The ARCI is not part of the racing industry and its primary concern lies with advising commissions and states and developing workable options for them. By solving the resource issue, S.4547 may prove to be a positive development. But the bill puts no limit on funding which is a luxury no State Racing Commission ever has had. It's a virtual blank check and people in the industry will ultimately have to decide whether they can pay what is assessed or get out.

Economic Impact of Mandates

S.4547 requires an expansion of current anti-doping and medication control programs, either by the state or the newly created Authority. Two new national entities will now be involved in horseracing and they both will require resources to fulfill their missions. There is no scenario where current allocated resources will be sufficient and the racing industry will be required to pay for these undefined costs, whether they are imposed by a State or the new Authority. The sponsors or proponents of S.4547 have yet to disclose those estimated costs.

To effectively understand the impact of this legislation it is essential for the sponsors or proponents of the legislation to share specific state by state cost projections that might apply under various scenarios:

1. The State continues and pays for its current program plus any anticipated expansion required by the Authority and a state estimate of costs to be apportioned to the industry to pay for the Authority and its Enforcement Agency;
2. The Authority assumes all costs for the entire mandated state based program of sample collection, laboratory testing, investigation and adjudication as well as the state's share of the cost of the Authority and the Enforcement Agency.

The racing industry has been struggling for years in a highly competitive environment for the entertainment and gambling dollar. The economics have been challenging to say the least and have driven many racing interests to advocate for and obtain new gaming opportunities or revenue sharing arrangements with gaming entities. Not all entities have been successful in this regard.

The impact of additional, undefined regulatory costs required by this legislation and/or decisions by states to privatize existing programs by turning them over to the Authority and using tax revenues elsewhere may prove problematic for some smaller and mid-sized racing entities as well as those with no alternate gaming revenue sources.

The States are advised to consult with local tracks to understand the specific impact this legislation may have on their continued operation. In those cases where a track is concerned about its ability to absorb additional regulatory fees, such knowledge should be shared with State policymakers in the Legislature and Executive Branch.

Based on concerns about the economics of racing and undefined new mandated costs, the following racetracks should be included on a "watch list" as to their ability to absorb additional regulatory costs. An inability or failure to absorb additional costs of doing business may force hard decisions by the ownership of these entities which may impact the extent or continuation of racing activity.

Entities included on this "**watch list**" have been suggested by either a regulatory agency, concerned industry constituency, or the entity itself. Obviously the release of detailed cost estimates remain essential to understanding the extent of the impact to any of

these entities. Commissions and state policymakers are encouraged to closely monitor these and all entities and to assess specific impacts once the sponsors or proponents of S.4547 release good faith cost projections.

In many communities the racing industry is fragile. In the event a venue decides to no longer offer live racing for whatever reason, the available markets for the import of large venue simulcast signals may also suffer, especially if simulcast imports are permitted only at a facility that offers live racing. It is also possible that a racing venue, seeking to sidestep mandated costs may explore the conduct of live racing absent interstate simulcasting. They may seek a greater reliance on intrastate simulcasting and other state sanctioned revenue opportunities such as gaming or historical racing.

The following represents the "Watch List" of venues and is not to be interpreted as a complete listing.

Arizona
Arizona Downs, Prescott Valley
Rillito Park Racetrack, Tucson
Turf Paradise, Phoenix

California
California Association of Racing Fairs
Fresno Race Track, Fresno
Golden Gate Fields, Albany – Possibly
Los Alamitos, Los Alamitos

Colorado
Arapahoe Park, Aurora

Idaho
Pocatello Downs

Illinois
Arlington Park, Arlington Heights
Fairmount Park, Collinsville
Hawthorne Race Course, Cicero

Iowa
Prairie Meadows, Altoona

Kentucky
Ellis Park Race Course, Henderson
Turfway Park, Florence

Louisiana
Delta Downs, Vinton
Evangeline Downs, Opelousas

Maryland
Maryland State Fairgrounds, Timonium

Nebraska
Columbus Races, Columbus
Fonner Park, Grand Island
Horsemen's Park, Omaha
Lincoln Race Course, Lincoln

New Mexico
Albuquerque Downs, Albuquerque
Ruidoso Downs, Ruidoso Downs
Sunland Park, Sunland Park
Zia Park, Hobbs

New York
Finger Lakes, Canandaigua

North Dakota
North Dakota Horse Park, Fargo

Oklahoma
Fair Meadows Race Track, Tulsa
Will Rogers Downs, Claremore

Oregon
Grants Pass Downs, Grants Pass
Various Fair Meets

Texas
Retama Park, Selma
Sam Houston Race Park, Houston

Washington
Emerald Downs, Auburn

West Virginia
Mountaineer Casino, Racetrack and Resort, Chester

Wyoming
Wyoming Downs, Evanston
Sweetwater Downs
Energy Downs

Applicability to Other Breeds

S.4547 applies primarily to thoroughbred racing, although there are provisions that allow the American Quarter Horse Association and the United States Trotting Association to have the requirements of the legislation apply to their races as well.

An individual State Racing Commission may also "opt in" the quarter horse and/or standardbred racing for their state.

A number of jurisdictions regulate multi-breed racing. Given the state budget pressures that may be an incentive for a state to privatize its anti-doping medication control program by handing it off to the Authority, it is not unrealistic to expect that those states choosing to turn over their thoroughbred program will also do that for the other racing breeds.

Again, this may not be a "one size fits all" implementation and could differ from one state to the next, creating and encouraging a lack of uniformity in the programs affecting quarter horse and standardbred racing and the policies implemented. With the recent endorsement of S.R.4547 by the Hambletonian Society, some states may use that as justification to include the regulation of standardbred racing anti-doping and medication policy in the program despite current opposition by the United States Trotting Association.

Issues of Constitutionality

The sponsor and proponents of this legislation believe this bill is consistent with the Constitution and would withstand any attempt to challenge it in the courts. If challenged only the courts will determine whether this will ultimately take affect. Several state Attorney Generals are reviewing this matter as are some racing constituencies with serious concerns about its implementation.

That being said, we have been informed that there are questions specifically as to the applicability of:

- The non-delegation doctrine that restricts the Congress from granting regulatory authority to private entities:
- The due process clause:
- The concept of taxation absent representation and the ability of the authority to impose assessments (taxes) on racing industry participants to pay for its programs;
- The anti-commandeering principle and other precedents that prevent the Congress from shifting the costs of regulation to the states;
- The Tenth Amendment's reservation of rights to the states.

It is unclear if the decision to deliberately exclude significant racing industry constituencies from the development of S.4547 will actually increase the possibility of a court challenge. Owners, trainers, racetracks, breeders and veterinarians are all subject to an undefined financial exposure. Likewise, it is also unclear whether there will be a challenge from one or more States given their wholesale disenfranchisement in developing policy for a state regulated activity.

Checks and Balances

While there are specific restrictions in the legislation on who can serve on the Authority Board or policy development committees, some of the safeguards that provide oversight and accountability for public entities and employees do not appear to exist.

Currently state agencies and employees are subject to:

- Independent third party financial audits;
- Independent third party programmatic audits;
- Statutory ethics and conflict of interest requirements;
- Financial disclosure requirements;
- Public corruption investigations by agencies so empowered.

There does not appear to be any provision in S.4547 providing this level of accountability. A decision to not require independent audits of the finances or programatic performance, financial disclosure of Authority Board Members and staff as well as a designation of an outside entity authorized to investigate allegations of corruption is a major weakness in the legislation, especially for an entity affecting a gambling enterprise.

Formal rule makings of the Authority will be done through the federal rule making process of the Federal Trade Commission. As such, there will be public notice and the opportunity for public comment. Regulated constituencies used to monitoring and or participating in policy development at the state racing commission level will need to shift their focus to following developments at the Authority to the extent they are known and the public filings made by the Federal Trade Commission.

State Racing Commissions all operate under open meetings requirements as well as laws governing access to pubic records. S.4547 contains no such transparency requirements for the Authority. The Authority appears to have total discretion as to what documents will be disclosed or whether the public may attend or participate in any of its meetings.

Initial Funding and Conflicts of Interest

S.4547 envisions that the Authority will need to incur debt in order to finance initial operations and start up costs. There is no restriction in the legislation that would prevent the Authority from borrowing money from organizations or individuals that do not meet the bill's own requirements defining independence.

Absent a such a restriction the Authority could be financially indebted to individuals or organizations with a biased interest in the sport, thereby undermining the independence of the entire effort.

State Racing Commission members or staff are largely precluded by ethics restrictions from becoming financial dependent or indebted on individuals or organizations with a vested interest in the work they perform.

Whether the lack of this restriction was inadvertent or deliberate is unknown.

To avoid any appearance of a conflict of interest or financial arrangement that could call into question the independence of the Authority, debt incurred by the entity should be restricted to arrangements made with publicly traded financial lending institutions. Industry participants and organizations should not be permitted to lend the Authority or any of its Directors and employees money.

Wholesale Disenfranchisement of the States and
State Based Expertise Long Relied Upon by the Industry

S.4547 is intended to improve upon and expand the anti-doping and medication control program of the states by shifting responsibility to a federally empowered private Authority, governed by a Board with a majority of independent Directors with no involvement in the industry.

The bill requires strict guidelines contained in the sections that define terms and govern who can serve on the Authority Board as well as key policymaking committees.

The net effect of S.4547 is to exclude or limit the involvement of extremely accomplished Equine Medical Directors, Prosecuting Attorneys, Veterinary Researchers, Pharmacologists, and Regulators upon whom the entire industry has relied upon for expertise on matters being shifted to the Authority.

Whether this is intentional is unknown. The legislation discards this expertise and assumes a degree of bias that is not justified or supported by the authorizing legislation governing the construct of state racing commissions and the governance of their employees or contract vendors.

Section 2 (6) includes Members and employees of State Racing Commissions as meeting the definition of an equine constituency that cannot be considered independent despite the fact that the state statutes under which they operate create them as independent regulatory bodies.

Likewise Section 2 (7) defines an Equine Industry Representative as including anyone representing a group whose members include state racing commissions, such as the Association of Racing Commissioners International. This legislation wrongly assumes a bias on the part of these individuals even if they may have extensive experience that may prove helpful to achieving the mission of the Authority such as directing investigations resulting in landmark decisions or serving as a hearing officer on contested matters.

Section 3 recognizes the Authority and defines the make up of the Board and standing committees. Section 3(e) defines those with conflicts of interest that would prevent them from serving on the Authority Board or as an independent member of a standing committee.

The bill would exclude or limit the involvement of a host of individuals long regarded as independent who have advised the industry. Specifically, Dr. Scott Palmer of the NY Gaming Commission, Dr. Rick Arthur of the California Horse Racing Board, Dr. Mary Scollay with the Racing Medication and Testing Consortium, Dr. Lynn Hovda with the Minnesota Racing Commission, Dr. Corinne Sweeney of the Pennsylvania Racing Commission, Dr. George Maylin of the NY Equine Drug Testing Program, Dr. Cynthia Cole, Director of the University of Florida Lab, and a host of others, many of whom serve on the Scientific Advisory Group of the Racing Medication and Testing Consortium.

Sections 3(e)(2) and (3) also appear to preclude anyone employed by The Jockey Club, its subsidiaries, or the American Association of Equine Practitioners in the same way.

Individuals long relied upon by the industry through several different organizations are being relegated to a lesser role in deference to those with no involvement with the industry.

As many of those being limited have no financial involvement in the industry other than being paid by a State Racing Commission, the exclusion or limitations can easily be corrected by changing the definition in Section 2(6) to eliminate the inclusion of a state racing commission in this definition. Conflict restrictions in Section 3(e) would be sufficient to exclude anyone with any financial interest that might be considered a conflict.

It is unclear whether the exclusion or limitation of anyone associated with a State Racing Commission from meaningful involvement with the Authority was deliberate or inadvertent. If it was deliberate, then the subheading of this analysis “Fixing the Kitchen by Building a New House” is exactly what Senator McConnell wants.

Impact on Investigations and Involvement of Federal entities.

S.4547 does not grant any expanded authority to conduct investigations beyond the status quo of what currently exists for State Racing Commissions.

Recent federal horseracing related indictments, like those before them, were the result of multi-agency cooperation where the work of state racing commissions was built upon and expanded by the reach of a federal law enforcement agency using wiretaps or other tools reserved for law enforcement. This bill does not give HISA racing investigators law enforcement status and, as such, they remain limited in the same way current investigators of state racing commissions are.

The bill fails to include a proposal made by the ARCI at hearings on the previous Horse Racing Integrity Act that experienced racing regulatory enforcement agencies believe essential to facilitate efforts to secure the interest and partnership of a federal law enforcement agency on matters they have uncovered or suspect.

The ARCI proposed creating designated desks in key federal agencies - the Department of Justice, the Federal Bureau of Investigation, Drug Enforcement Agency, and the Food and Drug Administration - to assist racing investigators and work to facilitate partnership of federal law enforcement or regulators in pursuing racing related cases with racing investigators. Why this suggestion was ignored by the sponsors or proponents is unclear.

Summary

S.4547 is landmark legislation for horseracing in the United States. Upon review it is a mix of positive reforms, partial improvements, and huge changes that may have unanticipated consequences.

The role of the Members of the Association of Racing Commissioners International has always been to implement and enforce the laws as they are written and to promulgate rules to do so.

The ARCI had opposed the predecessor of this legislation — the Horse Racing Integrity Act - because it did not believe it would truly address the primary threat to the sport — equine breakdowns. S.4547 is an improvement but is not as focused on the care of the horse as the ARCI has advocated.

S.4547 combats doping, a persistent concern of all involved in horseracing as well as every sport. Only time will tell if the changes required by this legislation will yield the results its proponents seek. Based upon the results of the human sport anti-doping programs, the ARCI has been skeptical but willing to have that skepticism proven wrong.

This bill leaves in place a severe regulatory gap affecting the care and treatments given young horses. While it does clarify and expand regulatory jurisdiction over the horse, it leaves unregulated everything done to that horse prior to its first workout. So further federal legislation may be necessary as S.4547 does not go far enough to address the concerns of the public, animal welfare organizations, and the state racing commissions lacking the authority to expand their regulatory reach. If the rate of equine breakdowns, particularly in flat racing, does not dramatically decrease, the industry will have missed a golden opportunity in this legislation.

The powers granted the new Authority are broad and if fully exercised can dramatically expand oversight over the veterinary care of "covered horses." As in human sport, the new Authority may impose a system where permission must be maintained for a "covered horse" to be given any medication in training that would be prohibited in racing.

It is surprising that the House of Representatives would pass companion legislation to S.4547 absent an understanding of the costs to be required of the industry. Many small and medium size venues are already economically challenged and there are questions about their ability to absorb additional regulatory costs, either imposed by the state or the Authority.

The authors of S.4547 were wise to include an option for a state unable to continue paying for its existing program as mandated by the Authority. States that shift their existing programs to the Authority will be free to use state tax dollars elsewhere (i.e., schools, healthcare), potentially creating an exposure for the industry and tracks in that state who will be required to pay the bills for the Authority program and not receive any corresponding reduction in their state taxes and fees.

It is not unrealistic to expect that quarter horse and standardbred races will be folded into this program by states seeking to avoid continued funding for horse racing anti-doping programs. These decisions will not be made by the racing commissions, but by Governors, Legislatures, and state budget directors. Anti-doping programs in human sport now regulated by the states for wagering are all paid for by the sport itself.

Upwards of $21,000,000 is currently expended for the existing state based programs. Many of these program are funded by taxes levied on the sport and appropriated to a commission as part of the annual state budget process. In some cases, a commission is authorized to charge the program directly to a racetrack. In those States that shift their program to the Authority, the local racing industry is exposed to the possibility of paying their current tax levies and no longer receiving that money back in services and then having to pay again for program costs levied by the new Authority. The language in S.4547 designed to address this is either not practical or easily circumvented by state budget directors.

This legislation will have no affect on the continued existence of the state regulatory bodies. In fact, as interested public entities excluded from being active and key participants in the Authority, it is expected these agencies will occupy the role of independent observers of the Authority, how it works, as well as its performance going forward in much the same

way as the industry itself assumed that role in assessing the performance of the various states.

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