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# Horse Racing Regulatory Reform through Constructive Engagement by Industry Stakeholders with State Regulators

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HORSE RACING REGULATORY REFORM THROUGH  
CONSTRUCTIVE ENGAGEMENT BY INDUSTRY STAKEHOLDERS  
WITH STATE REGULATORS

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One of the most frequently asked questions about the horse racing industry is whether it is capable of making meaningful and positive reforms without external intervention. Said another way, does the horse racing industry possess the will and structure to accomplish the safety and integrity reforms that the public demands? The authors answer these questions in the affirmative. Through its broad-based membership of industry stakeholders, the National Thoroughbred Racing Association's Safety and Integrity Alliance (Alliance) is the organization best positioned to facilitate the adoption of changes needed for horse racing to grow and flourish; and is better positioned to do so than Congress, a league office or even an interstate compact of individual state racing jurisdictions. Relying on a self-regulatory model, the Alliance facilitates national uniformity based on industry developed and agreed upon minimum safety and integrity standards via an established accreditation, compliance, and enforcement program. As of April 2012, twenty-four racetracks in the United States, including some of the largest and most visited, have received full accreditation by the Alliance. Among the currently accredited tracks are Keeneland, Churchill Downs, Del Mar Thoroughbred Club, Saratoga, Belmont Park, Gulfstream Park and Pimlico.<sup>1</sup>

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<sup>1</sup> *Tracks*, NAT'L THOROUGHBRED RACING ASS'N,  
<http://www.ntra.com/track/display/list/1> (last visited Apr. 1, 2012).

In this article, the authors argue that the Alliance, and its model of regulatory reform through constructive engagement by industry stakeholders with state regulators, offers the best opportunity for bringing about meaningful and significant safety and integrity reforms to horse racing.

## I. INTRODUCTION

While the last month of the 2011 racing season generated the first significant increase in pari-mutuel handle in the past four years, horse racing in the United States has witnessed a decline in wagering, attendance, and popularity over the past few decades.<sup>2</sup> There are many varied reasons for this decline.<sup>3</sup> There is no question that increased competition from commercial, Native American, and online casino gambling accounts for much of the decline,<sup>4</sup> but several other identifiable factors have contributed to this problem as well. One of those contributing factors may be the absence of a central governing body that could bring authority and uniformity to a fractious sport.<sup>5</sup> Further, fans have been vocal in their calls for greater human and equine safety, as well as, integrity in the overall conduct of the sport including improved wagering security and stricter drug and medication regulation. These concerns evidence the need for greater structure, organization, and uniformity in the horse racing.<sup>6</sup>

As the horse racing industry weighs its options for the future, its highest priority should be the adoption of industry-wide reforms that will help the sport to grow and flourish.<sup>7</sup> Such reforms must not only encourage

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<sup>2</sup> See Matt Hegarty, *Handle on U.S. Races Soars 18% in December; 2011 Handle Down 5.65%*, DAILY RACING FORUM, (Jan. 5, 2012), <http://www.drfr.com/news/handle-us-races-soars-18-december-2011-handle-down-565> (recognizing declining trend in wagering handle for horseracing industry and reporting significant increase in national handle for December 2011. Even by factoring in the significant increases in handle from December 2011, “[the national] handle still remains 28.9 percent lower than the 2003 figure, unadjusted for inflation.”).

<sup>3</sup> Bennett Liebman, *Reasons for the Decline of Horse Racing*, N.Y. TIMES (June 6, 2010) <http://therail.blogs.nytimes.com/2010/06/06/reasons-for-the-decline-of-horse-racing/> (arguing that other forms of gambling, traditional individual sports, suburbanization of America, corruption, drugs, public perception, government involvement, media, and various other factors are to blame for decline of horseracing).

<sup>4</sup> Michael Mancini, *New Study Shows Horse Racing in Decline*, INTERNETPOKER.COM (Aug. 15, 2011) <http://www.internetpoker.com/Poker-News/Poker-Industry/New-Study-Shows-Horse-Racing-in-Decline-4323.html> (noting that “[w]hile horse racing was in decline over the last decade, commercial casinos were thriving, seeing a 34% growth from 2001 to 2010.”).

<sup>5</sup> Luke Breslin, *Reclaiming the Glory in the “Sport of Kings” – Uniformity is the Answer*, 20 SETON HALL J. SPORTS & ENT. L. 297, 314-15 (2010) (recognizing problems in horseracing stemming from lack of centralized governing body and lack of uniformity due to state specific regulations).

<sup>6</sup> See *id.* at 315 (arguing that patchwork of rules amongst states has led to many regulatory problems, including decline in health and safety of horses).

<sup>7</sup> *Id.* at 323-24 (advocating for industry-wide change in regulation to “advance the overall state of American horse racing.”).

fans to return to the tracks, but entice new owners to join the game, increase the overall transparency and integrity of the sport, and make it easier for industry leaders to implement change on a uniform basis nationwide. An effective regulatory response will recognize that human and equine safety and the integrity of the sport are essential to horse racing's long-term survival. Through the implementation of such reforms, horse racing has an opportunity to regain its central place in American culture.<sup>8</sup>

Responding to the public's call for change, the National Thoroughbred Racing Association (NTRA) formed the Alliance in 2009.<sup>9</sup> The purpose of the Alliance is to act as a catalyst for change within the horse racing industry.<sup>10</sup> The Alliance, which is composed of a wide variety of industry stakeholders, uses a self-regulatory model to implement uniform reforms on a nationwide basis.<sup>11</sup> Unlike other more traditional self-regulatory approaches which eschew government involvement or intervention, the Alliance is a broad-based industry mechanism that has as its ultimate objective the implementation of optimal and uniform state regulation.<sup>12</sup>

Representing a collaborative and comprehensive response to the regulatory challenges facing horse racing, the Alliance provides a very practical approach for achieving a level of national uniformity among the many state governments that regulate racing at the local level. It does this by advocating national uniformity based on industry-specific and agreed upon minimum standards and best practices.<sup>13</sup> The Alliance implements and enforces these standards through a comprehensive and member-adopted accreditation, compliance, and enforcement program.<sup>14</sup> For these reasons, the Alliance may be the best option for securing long term, uniform change in the way that horse racing is regulated in the United States.<sup>15</sup>

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<sup>8</sup> See *id.* at 298 (detailing history of horse racing as "a national pastime in the United States, despite the considerable and well-known stigmas attached to the sport."); Jennifer M. Jabroski, Note, *Reining in the Horse Racing Industry: A Proposal for Federal Regulation of Steroid Use in Racehorses*, 1 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 67, 68 (2009) (addressing need for uniformity and reform in horseracing industry).

<sup>9</sup> NAT'L THOROUGHBRED RACING ASS'N SAFETY & INTEGRITY ALLIANCE, CODE OF STANDARDS 2 (2011), available at [http://www.ntra.com/safetyalliance/Final\\_2011\\_Code.pdf](http://www.ntra.com/safetyalliance/Final_2011_Code.pdf) [hereinafter CODE OF STANDARDS (2011)].

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* (describing how Alliance sets forth for its Members minimum set of standards to encourage national uniformity and compliance).

<sup>14</sup> See generally CODE OF STANDARDS (2011), *supra* note 9.

<sup>15</sup> See *id.* at 2 (describing amendment process as new research and recommendations become available to provide industry with long term regulatory solution).

## II. THE PUBLIC'S DEMANDS OF RACING

Several high profile and televised horse injuries and fatalities, including Barbaro in the 2006 Preakness Stakes and Eight Belles in the 2008 Kentucky Derby, coupled with the 2008 admission that a Triple Crown contender was openly administered legal anabolic steroids has caused the public's demands for reform to grow exponentially.<sup>16</sup> These demands for change focused on two primary areas – human and equine safety and the integrity of the sport. One of the most frequently asked questions stemming from these public demands, and one that has yet to be fully answered, is whether the industry is capable of making the necessary reforms without external intervention by Congress or some other private or administrative body.

## III. HOW IS HORSE RACING CURRENTLY REGULATED IN THE UNITED STATES

The horse racing industry in the United States is regulated via a decentralized model that places regulatory authority in the hands of state authorities.<sup>17</sup> These authorities are individually responsible for regulating all aspects of the sport within their respective jurisdictions. Currently, there are thirty-eight separate and distinct states that allow the conduct of pari-mutuel horse racing.<sup>18</sup> Each state's regulatory authority possesses the power to license all participants; adopt and implement drug and medication testing; enforce its respective rules; and allocate the number of race dates.<sup>19</sup> The individual jurisdictions are further responsible for ensuring the safety of all participants and the overall integrity of the sport not only for pari-

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<sup>16</sup> Mike Klingaman, *Five Years Late: Barbaro's Death Remembered*, THE BALTIMORE SUN (Jan. 28, 2012), [http://articles.baltimoresun.com/2012-01-28/sports/bs-sp-barbaro-0129-20120127-8\\_1\\_gretchen-jackson-pennsylvania-s-new-bolton-center-barbaro](http://articles.baltimoresun.com/2012-01-28/sports/bs-sp-barbaro-0129-20120127-8_1_gretchen-jackson-pennsylvania-s-new-bolton-center-barbaro) (discussing how Barbaro captured public's attention and catapulted safety and health of thoroughbreds in racing to national level); see also *Eight Belles' Death Sparks Controversy*, CBSNEWS (Feb. 11, 2009), [http://www.cbsnews.com/2100-201\\_162-4069876.html](http://www.cbsnews.com/2100-201_162-4069876.html) (describing how death of Eight Belles at 2008 Kentucky Derby sparked controversy on national level about safety and integrity of horseracing); Daily News Staff, *Big Brown's Legal Doping a Concern*, N.Y. DAILY NEWS (May 15, 2008), [http://articles.nydailynews.com/2008-05-15/sports/17897265\\_1\\_big-brown-doping-racing-medication](http://articles.nydailynews.com/2008-05-15/sports/17897265_1_big-brown-doping-racing-medication) (reporting on Big Brown's trainer revealing use of steroids in preparation for Triple Crown races and subsequent public reactions).

<sup>17</sup> *Five Ways to Improve the Industry*, BLOODHORSE.COM (Mar. 22, 2011), <http://cs.bloodhorse.com/blogs/industry-voices/archive/2011/03/22/five-ways-to-improve-the-industry.aspx>.

<sup>18</sup> Blood-Horse Staff, *Kentucky Racing Compact Bill Signed Into Law*, BLOODHORSE.COM (May 3, 2011), <http://www.bloodhorse.com/horse-racing/articles/62809/kentucky-racing-compact-bill-signed-into-law>.

<sup>19</sup> See 30A C.J.S. *Entertainment and Amusement* § 27 (2011).

mutuel wagers, but also for owners, trainers, jockeys, the horses, and any others who participate in the sport of horse racing.<sup>20</sup>

The existence of such a decentralized model combined with (i) a lack of regulatory uniformity from state to state, (ii) overly burdensome financial rules that include both antiquated tax laws and statutorily mandated take-out rates, and (iii) the sport's overall inability to quickly and uniformly adapt to market forces, have all combined to limit the sport's ability to grow in the face of competition for the wagering dollar.

### *A. The Advent of the Decentralized Regulatory Model*

With the expansion of regulatory government under President Franklin D. Roosevelt and increased power sharing with the state legislatures in the 1930s, the states assumed more control over all aspects of daily life, including the governance of the sport of horse racing.<sup>21</sup> States, empowered to exercise delegated powers for a public purpose, adopted rules intended to protect and ensure the safety of trainers, jockeys, owners, spectators, and the horses themselves.<sup>22</sup> This sweeping power allowed the various state racing commissions to adopt and implement local rules intended to ensure the integrity of the sport and to guarantee the fairness of the races for the purpose of protecting those wagering on the sport.<sup>23</sup> Such authority to regulate the sport has remained with the states and has resulted in the decentralized regulatory model currently in place.<sup>24</sup>

Traditionally, the state racing commissions have focused on four broad areas of regulatory oversight. These include licensing, rulemaking, enforcement, and penalties.<sup>25</sup> Each is briefly described below.

#### *1. Licensing*

The states control over licensing was confirmed in 1951. This marked a decisive change in the sport because state governments could no longer delegate licensing power to private organizations.<sup>26</sup> Instead, the power to license was vested in state racing commissions, which require racing participants to obtain an occupational license and pay a licensing

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<sup>20</sup> See *id.*

<sup>21</sup> Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473, 498 (2004).

<sup>22</sup> See 30A C.J.S. *Entertainment and Amusement* § 27 (2011).

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> *Fink v. Cole*, 97 N.E.2d 873, 876 (N.Y. 1951); see also Howland, *supra* note 21, at 503-

fee.<sup>27</sup> Among those required to purchase licenses were horse owners, trainers, jockeys, drivers, backstretch personnel, and concessionaires.<sup>28</sup> Even after the power to license shifted to the states, other responsibilities remained under the authority of private entities such as The Jockey Club, which retained responsibility for the breed registry.<sup>29</sup>

## 2. Rulemaking

With the regulatory power shift, the state racing commissions also gained rulemaking authority to implement rules and regulations.<sup>30</sup> To this day, state racing commissions maintain wide regulatory discretion. They have implemented rules and regulations impacting all aspects of the sport including licensing, race calendars, medication and testing, trainer responsibility, and even the conduct and pricing of pari-mutuel wagering through the regulation of pari-mutuel take-out percentages.<sup>31</sup> To satisfy due process requirements, an implemented horse racing statute or regulation must convey what conduct is prohibited and what penalties may be imposed.<sup>32</sup>

Arguably the most important and highly contested of these rules delegated to the state racing commissions are the trainer-responsibility rules. Focusing on the prevention of drug use in horse racing, the rules serve the same purpose as the rules prior to the emergence of state racing commissions – to prevent the use of illegal drugs, maintain the integrity of the sport, and uphold public confidence in the horse racing industry.<sup>33</sup> Under the trainer-responsibility rules, when a horse tests positive for a prohibited drug or medication, the trainer is held accountable regardless of who actually administered the prohibited substance.<sup>34</sup> This is still generally true even if someone other than the trainer administers a prohibited drug or gives contaminated feed to the trainer's horse.<sup>35</sup>

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<sup>27</sup> Jewel N. Klein & Ray H. Garrison, *Practice and Procedure Before Racing Commissions*, 78 KY. L.J. 477, 481 (1990).

<sup>28</sup> *Id.*

<sup>29</sup> Howland, *supra* note 21, at 498-99.

<sup>30</sup> See 30A C.J.S. *Entertainment and Amusement* § 27 (2011).

<sup>31</sup> See Bradley S. Friedman, *Oats, Water, Hay and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horse Racing*, 16 ANIMAL L. 123, 133 (2009).

<sup>32</sup> See *id.* at 132.

<sup>33</sup> *Id.* at 133.

<sup>34</sup> Bennett Liebman, *The Trainer Responsibility Rule In Horse Racing*, 7 VA. SPORTS & ENT. L.J. 1, 2 (2007).

<sup>35</sup> *Id.*

### 3. Enforcement

States typically delegate their enforcement capabilities to an executive director and staff of the state racing commission.<sup>36</sup> For example, Kentucky has an executive director appointed by the Governor.<sup>37</sup> This individual's primary duty is to carry out the policy and program directives of the state's racing commission.<sup>38</sup> The executive director handles the daily ministerial operations and enforces the rules of the commission.<sup>39</sup>

When rule violations occur or are suspected to have occurred, the initial step is to hold a stewards' hearing.<sup>40</sup> If the steward's decision is not binding under state law, then the affected party can appeal to the state racing commission.<sup>41</sup> Depending on the issue in question, a party that remains dissatisfied may also appeal to the state or federal appellate court.<sup>42</sup> When a steward or judge finds that the horse racing regulations have been violated, civil penalties may be imposed.<sup>43</sup>

### 4. Civil Penalties

State racing commissions have a variety of civil penalties at their disposal when violations occur. Penalties may include changing the finishing order of the race, prohibiting participation in the purse, disqualifying a winning horse, or fining trainers, owners, or other persons for the violation.<sup>44</sup> Prior to a race, owners are given notice of these penalties through a state statute, rule, or policy manual.<sup>45</sup> For example, if a winning horse tests positive for an illegal drug after it finishes a successful race, then the state racing commission may redistribute the winning purse.<sup>46</sup>

Trainers may also be suspended for violating a state's rules. Although other racing commissions generally honor these suspensions, there are still instances today where such suspensions are not recognized in neighboring jurisdictions.<sup>47</sup> In cases where one commission fails to honor another state's suspension of a trainer, the deterrent effect of civil penalties

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<sup>36</sup> See 30A C.J.S. *Entertainment and Amusement* § 27 (2011).

<sup>37</sup> KY. REV. STAT. ANN. § 230.230(1) (West 2011).

<sup>38</sup> *Id.*

<sup>39</sup> See 30A C.J.S. *Entertainment and Amusement* § 27 (2011).

<sup>40</sup> Kimberli Gasparon, *The Dark Horse of Drug Abuse: Legal Issues of Administering Performance Enhancing Drugs to Racehorses*, 16 VILL. SPORTS & ENT. L.J. 199, 204 (2009).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See 30A C.J.S. *Entertainment and Amusement* § 27 (2011).

<sup>44</sup> *Id.*

<sup>45</sup> See *id.*

<sup>46</sup> *Id.*

<sup>47</sup> See Gasparon, *supra* note 40, at 205.



is undermined.<sup>48</sup> Along with penalizing the trainers, some states penalize veterinarians who prescribe the drugs.<sup>49</sup> Some states, such as Kentucky, will enforce both criminal sanctions and civil penalties against violators.<sup>50</sup>

### *B. Limitations of the Current Model*

Currently, the states individually regulate all aspects of horse racing under a decentralized model. Therefore, the individual states do not act simultaneously and the overall sport lacks the regulatory uniformity that one sees in other major American sports, such as professional baseball or basketball. There is no established structure by which to implement and enforce uniform national rules. Additionally, industry stakeholders have few opportunities to access or participate in the rulemaking process in every racing jurisdiction. Considering that racing may take place in as many as thirty-eight jurisdictions, the process of trying to convince individual racing commissions to cooperate in creating a comprehensive solution is burdensome, time-consuming, and expensive for stakeholders.

While the Association of Racing Commissioners International (ARCI) publishes model rules, there is no mechanism by which to enact and enforce these model rules in individual jurisdictions.<sup>51</sup> Even those jurisdictions that use the ARCI model rules as a guide for adopting new regulatory rules often modify them slightly, or significantly, to suit their individual circumstances.<sup>52</sup>

The sport is also made up of numerous stakeholders with varying interests and those interests do not always coincide.<sup>53</sup> Stakeholders involved in the sport include the regulators themselves, track operators, jockeys, owners, breeders, trainers, racing associations, the online betting services, and aftercare organizations.<sup>54</sup> “It’s rare when all these parties are on the same page. This really paralyzes the industry and makes it very difficult to

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See id.*

<sup>51</sup> *Model Rules, RACING COMMISSIONERS INT’L*, [http://www.arci.com/Racing\\_Commissioners\\_International/Model\\_Rules.html](http://www.arci.com/Racing_Commissioners_International/Model_Rules.html) (last visited Mar. 4, 2012).

<sup>52</sup> Blood-Horse Staff, *Approval of Bute Rule Slowed in Louisiana*, BLOODHORSE.COM (Jan. 28, 2012), <http://www.bloodhorse.com/horse-racing/articles/67179/approval-of-bute-rule-slowed-in-louisiana>.

<sup>53</sup> Paul Doocey, *Post Time for Change*, CASINO JOURNAL (Feb. 1, 2010).

<sup>54</sup> *The Jockey Club Fact Book - National Economic Impact Study: Size of The Horse Industry* (1995), available at <http://www.equatecorp.com/numbers%20page.html> (last visited March 12, 2012).

*The Equine Industry, THE JOCKEY CLUB FACT BOOK*, <http://www.equatecorp.com/numbers%20page.html> (last visited, Apr. 2, 2012).

respond to changing market conditions.”<sup>55</sup> Such differences are a leading contributor to the difficulties in achieving national cooperation and regulatory uniformity.

The lack of uniformity combined with the difficulties associated with developing and implementing a cooperative approach have contributed to a regulatory environment that favors the status quo. Since the states regulate the sport within their own respective borders, a semi-competitive environment exists whereby states compete for racing business from owners and trainers because they are capable of searching for the most favorable and least burdensome racing venues.<sup>56</sup> This system has created a forum shopping practice of sorts intended to entice racing business,<sup>57</sup> and has created little or no incentive for the states to dramatically change their rules.

### *C. Economic Restraints Limiting Growth*

The presence of outdated and antiquated rules in the sport also contributes to the economic restraints on growth and reform. For example, the existence of outdated tax laws and legally mandated take-out rates have hampered the horse racing industry’s ability to compete with other forms of legalized gambling, such as those offered by casinos and sports books.<sup>58</sup> Such restrictive and archaic economic regulations have had a direct and adverse impact on the sport and its ability to grow.

Many of the taxes applicable to horse racing today were passed at a time when the sport was the only legalized form of gambling in the United States. Starting in the 1920’s, race tracks were granted lucrative monopolies to conduct pari-mutuel wagering in a state in return for the payment of high excise taxes – taxes assessed on gross handle and not net revenue.<sup>59</sup> With the emergence of lotteries and casinos, many of the state

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<sup>55</sup> Doocey, *supra* note 53 (quoting Eugene Christiansen, principal of research firm Christiansen Capital Advisors).

<sup>56</sup> See Fred A. Pope, *Commentary: Time to Change the Structure*, THOROUGHBRED TIMES (Sept. 11, 2011), available at <http://www.thoroughbredtimes.com/national-news/2011/09/11/commentary-time-to-change-the-structure.aspx> (noting that by allowing questionable practices, more horses may attend races and more jobs may be created for the state).

<sup>57</sup> See *id.*

<sup>58</sup> PERRY NUTT, ET. AL., KENTUCKY THOROUGHBRED BREEDING INDUSTRY AND STATE PROGRAMS THAT ASSIST THE EQUINE INDUSTRY 21 (2011), available at <http://media.kentucky.com/smedia/2011/11/10/14/52/51jr2.S0.79.pdf>.

<sup>59</sup> Richard A. McGowan, *A Short History of Gambling in the United States*, GALE: OPPOSING VIEWPOINTS, <http://ic.galegroup.com/ic/ovic/ViewpointsDetailsPage/ViewpointsDetailsWindow?displayGroupName=Viewpoints&disableHighlighting=false&prodId=OVIC&action=2&catId=&documentId=GALE%7CEJ3010079223&userGroupName=sacr73031&jsid=62916e0a417a2c9be8c6da4f4edc7ffc> (last visited Apr. 1, 2012).

tax laws applied to wagering on racing now serve as economic restraints.<sup>60</sup> However, states have been slow to relinquish excise taxes that they traditionally received from horse racing even though racing's monopoly status is long gone.<sup>61</sup> These taxes limit racing's ability to price its product competitively and restrict access to the capital needed to upgrade racing facilities. Moreover, this antiquated taxation model also explains one of the primary obstacles to a centralized regulatory model. Since the tax revenues generated by horse racing are currently going into their respective state coffers, states simply are not willing to give up any autonomy and the revenues that flow from such autonomy. In many states, there is heavy reliance on the excise taxes levied on horse racing to fund other state programs and services.<sup>62</sup>

#### IV. MODELS FOR REFORM

To grow and flourish into the future, the sport needs to adopt and implement a regulatory model that achieves some measure of national uniformity. Possible alternatives to replace the current decentralized model that have been suggested include (i) Congressional intervention and regulation, (ii) privatization, and (iii) an interstate compact. A collaborative and industry-supported organization that is responsible for implementing and enforcing a code of uniform standards like the Alliance, offers the best opportunity for success moving forward.

In order to better understand why the Alliance is the best alternative, the concepts of Congressional intervention, privatization, and an Interstate Compact are analyzed below.

##### *A. Congressional Intervention and Regulation*

Congressional intervention and regulation is an approach frequently advocated both by those within and those outside of the horse racing industry. Some view it as the only way to impose regulatory uniformity on the industry as a whole. However, such a solution carries significant political risks, including the possibility of subjecting the sport to crushing new taxation and regulation. Furthermore, it is reasonable to assume that the same forces keeping racing under the regulatory control of states will also expend enormous energy to thwart any effort at federalizing horse

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<sup>60</sup> See Doocey, *supra* note 53.

<sup>61</sup> See *id.* (noting that States like the taxes generated by the horse racing industry).

<sup>62</sup> For example, in Kentucky, the excise taxes levied on horse racing fund the state Thoroughbred Development Fund, Standardbred Development Fund, Quarter Horse, Appaloosa, and Arabian Development Fund, and the Equine Industry Program at the University of Louisville. See KY. REV. STAT. ANN. §138.510(1)(c) (West 2010).

racing. The lost revenue to state governments alone is reason enough to expect resistance to federalization. Add to that idea the notion that our federal system is increasingly looking to states and localities to regulate personal economic behavior and you have an environment that is anything but receptive to federal intervention.

Furthermore, there appears to be no interest in creating a new federal bureaucracy for racing. The costs involved and the fact that those who would be regulating the sport are unfamiliar with the workings of horse racing provide ample reason to proceed very cautiously where federal intervention is involved. More likely than not, horse racing would be faced with overlapping federal and state regulatory schemes resulting in new costly, burdensome, and potentially inconsistent regulation.

One final concern is that the passage of federal legislation and the creation of a federal bureaucracy will make racing vulnerable to forces hostile to its existence. Lacking knowledge and familiarity, federal lawmakers and regulators may be urged to impose rules and penalties that could cripple the sport. Without an intimate knowledge of the business and its many positive contributions to host state economies, damage could be done to the livelihoods of many people by federal authorities who are far too removed from the consequences of their actions. For these reasons, federal intervention has never been the preferred route for horse racing oversight or regulation.

### *B. Privatization*

The privatization of the sport through the formation of a conference or sports league is another solution often pushed by industry reformers.<sup>63</sup> In fact, leagues and conferences have proven to be very helpful to the commercialization of a wide variety of sports in the United States.<sup>64</sup> The National Football League is an excellent example for understanding the potential commercial upside to a cooperative arrangement like a sports league. The challenge for horse racing is that such affiliations require individual states and their respective regulatory authorities, horsemen's organizations, racing associations, jockeys, and other participants to cede their regulatory and commercial authority to a private centralized body. Considering the financial interests of the individual state in horse racing and the many independent financial interests of the participants, such privatization models have proven time and again to be unworkable.

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<sup>63</sup> See Pope, *supra* note 56 (discussing the advantages of a league-based model with a talent-centered focus).

<sup>64</sup> See *id.*

Moreover, the very nature of the sport itself and its economic reliance upon pari-mutuel wagering poses a serious challenge to privatization. Historically, the public has always been distrustful of privately regulated gambling operations.<sup>65</sup> In addition, there are serious antitrust concerns that arise whenever competitors combine to form organizations with significant economic power.<sup>66</sup> Even if a private solution could be devised that survived antitrust scrutiny, there remains a hesitation among industry stakeholders to move in the direction of cooperation and a pooling of rights and authority.<sup>67</sup> In short, the necessary industry cooperation on commercial and regulatory matters is elusive at best and probably non-existent.

### *C. Interstate Compact*

An interstate compact covering aspects of racing and wagering also presents a common multi-jurisdictional approach for promoting regulatory uniformity. With the goal of including members from each state racing jurisdiction, an interstate compact could provide an expedited process for publishing a much-needed uniform rulebook and forum for responding to national issues impacting the sport. Ideally, an interstate compact could facilitate the adoption of rules in member states without usurping individual state sovereignty.<sup>68</sup> In fact, the sport's move to regulatory uniformity is actually closer than it appears when viewing where races are currently held. Six states comprise fifty percent of all purses nationally and sixteen states

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<sup>65</sup> See Roger Dunstan, *Gambling in California: History of Gambling in the United States*, CAL. RES. BUREAU (Jan. 1997), <http://www.library.ca.gov/crb/97/03/Chapt2.html>.

<sup>66</sup> See 15 U.S.C. §§ 1-2 (2004); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). The Sherman Antitrust Act ("Sherman Act") was passed in 1890 to combat anticompetitive practices, reduce market domination by individual corporations, and preserve unfettered competition in trade and commerce. As applied to horse racing in the past, it is intended to prevent collusion and anti-competitive conduct. Violations under the Sherman Act take one of two forms—either as a per se violation or as a violation of the rule of reason. Under the Act, certain business practices are deemed to be per se violations. A per se violation requires no further inquiry into the practice's actual effect on the market. For those practices however that are not as clear, the courts apply a totality of the circumstances test known as the Rule of Reason that asks whether an alleged practice promotes or suppresses market competition. The fact that tracks and all horsemen are independent competitors and that each operates pari-mutuel wagering in a separate market pursuant to a state-granted monopoly makes it unlikely that any organization of racetracks or horsemen that sets simulcasting rates, controls race dates, or performs any other traditional regulatory function will survive anti-trust scrutiny.

<sup>67</sup> Empire State Harness Horsemen's Alliance, *New York Horsemen Oppose Interstate Racing and Wagering Compact*, HARNESS RACING NEWSROOM (June 24, 2010), <http://xwebapp.ustrotting.com/absolutenm/templates/article.aspx?articleid=37592&zzoneid=1>.

<sup>68</sup> See Tom LaMarra, *State Legislators Told Compact Viable Option*, BLOODHORSE.COM (July 28, 2010), <http://www.bloodhorse.com/horse-racing/articles/58101/state-legislators-told-compact-viable-option>.

comprise ninety percent of all purses nationally.<sup>69</sup> Thus, it is likely possible to get a high degree of uniformity with relatively few states in a compact.

The ARCI has developed compact is known as the Racing Regulatory Compact (the “RRC”) to provide a national approach to racing regulation.<sup>70</sup> The RRC includes an internal rule making process that relies on industry advisory committees. Similar to existing federal and state regulatory agencies, the RRC utilizes standard notice and comment procedures for maximum input and participation from the industry and the public.<sup>71</sup>

Despite the RRC’s potential benefits, there are several challenges associated with the development and ongoing continuance of it. Among the challenges to its success is the reluctance of some industry stakeholders to centralize regulatory power and authority.<sup>72</sup> Additionally, the RRC includes voluntary opt out provisions. These provisions are absolutely necessary to gain support at the state level, but they ultimately limit the overall effectiveness of the RRC because they undermine the goal of uniformity, which is the very reason for the RRC.<sup>73</sup> Due to these challenges, states have been slow to adopt the RRC. To date, only a few states including Kentucky, Arizona and Colorado, have adopted the RRC, and the proposal has faced major opposition in other states where its passage has been attempted but shelved for the time being.<sup>74</sup> Given these significant industry and political hurdles, the RRC does not appear to be a viable solution at present.<sup>75</sup>

## V. THE NTRA ALLIANCE IS THE MOST ACHIEVABLE SOLUTION

If the current decentralized model is not working and none of the models discussed above are viable options presently, what is the solution to the public’s demand for change? A self-regulatory organization, such as the model presented by the Alliance, is currently the most achievable solution

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<sup>69</sup> PEGGY HENDERSHOT, PROPOSED INTERSTATE RACING AND WAGERING COMPACT 3(Dec. 8, 2009), available at [http://www.ua-rtip.org/symposium/2009/09\\_powerpoint/hendershot\\_peggy.pdf](http://www.ua-rtip.org/symposium/2009/09_powerpoint/hendershot_peggy.pdf) (presentation at Race Track Industry Symposium).

<sup>70</sup> See Tom LaMarra, *Officials: Compact Comes At A Critical Point*, BLOODHORSE.COM (Apr. 13, 2010), <http://www.bloodhorse.com/horse-racing/articles/56414/officials-compact-comes-at-critical-point>.

<sup>71</sup> RACING COMM’RS INT’L, MODEL LEGISLATION FOR A NATIONAL RACING REGULATORY ENTITY: NEW INTERSTATE COMPACT TO FACILITATE STATE REGULATION OF RACING AND WAGERING 13 (Feb. 10, 2010), available at [http://www.racingcompact.com/New\\_Racing\\_Regulatory\\_Compact/RRC\\_files/2011\\_02\\_10\\_Compact\\_Model\\_Bill\\_.pdf](http://www.racingcompact.com/New_Racing_Regulatory_Compact/RRC_files/2011_02_10_Compact_Model_Bill_.pdf).

<sup>72</sup> See LaMarra, *supra* note 70.

<sup>73</sup> See Janet Patton, *Racing, Wagering Compact Called for*, KENTUCKY.COM (Mar. 31, 2010), <http://www.kentucky.com/2010/03/31/1203843/racing-wagering-compact-called.html>.

<sup>74</sup> See COLO. REV. STAT. §12-60-202(5) (2010), see also KY. REV. STAT. ANN. §230.3761 (West 2011). But see generally Empire State Harness Horsemen’s Alliance, *supra* note 67.

<sup>75</sup> Empire State Harness Horsemen’s Alliance, *supra* note 67.

to the sport's need for uniform regulatory change. First, it is important to understand what is meant by the phrase "self regulatory organization" (SRO), and determine the ways in which the Alliance incorporates the various benefits of a SRO in furtherance of the goal of uniform national regulation.

### *A. Self Regulatory Organizations*

#### *1. Function*

A SRO is used by various industries such as healthcare, education, and insurance because such an organization increases legitimacy, establishes standards for the industry, provides a mechanism to enforce adherence to industry norms, and fills a perceived gap in federal and state regulatory oversight thereby staving off further government intervention.<sup>76</sup> Examples of such organizations, which are currently functioning effectively, include the Joint Commission on the Accreditation of Healthcare Organization (healthcare), the Clearing House Payments Company (banking) and the Entertainment Software Rating Board (video games).<sup>77</sup>

#### *2. Strengths*

SROs have many strengths. They can be organized quickly around a basic code of conduct and they can adapt quickly to changing circumstances. They also utilize the industry's inherent knowledge and historical experience to create realistic and effective standards. Most importantly for horse racing, SROs can provide a degree of national uniformity to industries that are not federally regulated.

Further, SROs are a useful tool for industries that need national and uniform regulation due to SROs inherent flexibility. When correctly implemented, SROs can supplement and enhance state regulation. They are designed to evolve over time, allowing an industry to develop processes for addressing future challenges and for the development of industry wide best practices.

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<sup>76</sup> Memorandum from Akin Gump Strauss Hauer & Feld, LLP on Self-Regulatory Organizations to Alex Waldrop, Nat'l Thoroughbred Racing Ass'n President and CEO 2 (on file with author).

<sup>77</sup> *Id.* at 2.

### 3. *Potential Weaknesses*

Despite the many strengths of SROs, they do have potential areas of weakness. SROs require industry-wide acceptance and the public, at times, may be skeptical of industry vigilance and impartiality. Another perceived weakness is that an SRO's sanctioning and enforcement powers are limited; for example, they typically cannot impose monetary fines. Thus, considering that enforcement is essential to establishing an SRO's legitimacy in the eyes of regulators and the public generally, an SRO must have a thorough and effective list of consequences for non-compliance. In other words, unless the SRO can certify compliance and punish non-compliant participants, there will be skeptics about its effectiveness.

#### *B. Introduction to the NTRA Safety and Integrity Alliance*

Given the many benefits of the SRO model, the NTRA created the Alliance in response to the public's demand for changes to the sport and as a vehicle by which to improve the safety and integrity of the industry.<sup>78</sup> At the time of launch, the Alliance was endorsed by fifty-five industry stakeholders, including racetracks, owners, breeders, horsemen, jockeys, veterinarians, and sales companies who agreed to uphold and support the goals and objectives of the organization.<sup>79</sup> In an industry with "decentralized power" and "fractious" participants, the Alliance provides a centralized framework for the adoption of minimum standards which are enforced through an established track accreditation process.<sup>80</sup>

Since its formation, the Alliance has fully accredited some twenty-four racetracks, certifying their compliance with the Alliance's comprehensive Code of Standards (the "Code").<sup>81</sup> Working cooperatively with the state governments of each state where a track has been accredited, the Alliance has proven to be an effective tool for improving the national regulatory environment for horse racing. Most importantly, as will be demonstrated below, the Alliance and its accreditation process have proven

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<sup>78</sup> See Tom LaMarra, *NTRA Seeks Director for New Alliance*, BLOODHORSE.COM (Oct. 23, 2008), <http://www.bloodhorse.com/horse-racing/articles/47726/ntra-seeks-director-for-new-alliance> (discussing announcement of safety and integrity initiative and appointment process for Alliance Director).

<sup>79</sup> See *id.*

<sup>80</sup> See CODE OF STANDARDS (2011), *supra* note 9, at 2.

<sup>81</sup> As of the writing of this article, the following race tracks have received Alliance accreditation: Aqueduct Racetrack, Arlington Park, Belmont Park, Calder Race Course, Canterbury Park, Churchill Downs, Del Mar Thoroughbred Club, Fair Grounds Race Course, Finger Lakes Casino and Racetrack, Golden Gate Fields, Hollywood Park, Keeneland Race Course, Kentucky Downs, Monmouth Park, Pimlico Race Course, Santa Anita, Saratoga Race Course, Suffolk Downs, Sunland Park, Turfway Park, and Woodbine. See *Tracks*, *supra* note 1.



to be a catalyst for a broader commitment to the health and safety of the industry's human and equine athletes, and to the integrity of the sport - which are top priorities for the industry.

### *1. Prompt Implementation*

After its formation, the Alliance quickly put into practice a wide range of safety and integrity recommendations.<sup>82</sup> Its ability to move quickly and decisively was key to successful implementation. The Alliance also provided the industry with a mechanism to work toward solutions in other areas of the sport. Importantly, all major tracks and horsemen's groups, which quickly agreed to adhere to industry norms through an established and implemented track accreditation process, quickly endorsed the Alliance.<sup>83</sup>

### *2. Collaborative Solution*

The Alliance provides a collaborative solution to the various safety and integrity issues that currently exist in the sport. Composed of a wide range of industry stakeholders, the Alliance represents the collective consideration and work product of key stakeholder organizations and individuals within the horse racing industry.<sup>84</sup> By assembling a diverse array of industry stakeholders, the Alliance uses industry knowledge and experience to create realistic and effective standards that can be universally applied and implemented across all racing jurisdictions via the organization's established track accreditation program. To that end, Alliance members must individually and collectively commit to ensuring "that the sport of horse racing is pursued in a manner consistent with high ethical standards and compliance with applicable laws and regulations."<sup>85</sup>

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<sup>82</sup> See generally NAT'L THOROUGHBRED RACING ASS'N SAFETY & INTEGRITY ALLIANCE, CODE OF STANDARDS (2009), available at [http://www.ntra.com/images/CODE\\_OF\\_STANDARDS.pdf](http://www.ntra.com/images/CODE_OF_STANDARDS.pdf) [hereinafter CODE OF STANDARDS (2009)]

<sup>83</sup> *Id.*

<sup>84</sup> See TOMMY G. THOMPSON, NATIONAL THOROUGHBRED RACING ASSOCIATION SAFETY AND INTEGRITY ALLIANCE: REPORT OF THE INDEPENDENT MONITOR 3 (2011), available at [http://www.ntra.com/images/NTRA\\_2011\\_Report\\_of\\_the\\_Independent\\_Monitor.pdf](http://www.ntra.com/images/NTRA_2011_Report_of_the_Independent_Monitor.pdf) (recognizing Alliance's central role for every horsemen's group in United States to pledge support for upholding health and safety of racing's athletes, both human and equine).

<sup>85</sup> See generally CODE OF STANDARDS (2011), *supra* note 9, at 2.

### 3. *Comprehensive Standards*

The Alliance sets forth a comprehensive list of minimum standards in its Code, which are implemented by Alliance members in their respective roles in the horse racing industry.<sup>86</sup> The Code is intended to be an ever changing and evolving document that is consistently updated over time with new research and as industry stakeholders put forth recommendations.<sup>87</sup> When originally adopted, the Code included five broad categories – 1) injury reporting and prevention; 2) a safer racing environment; 3) medication and testing; 4) jockey welfare and safety; and 5) aftercare for retired horses.<sup>88</sup> Within those broad categories, specific standards were outlined.

Consistent with its original intent to be an ever-evolving document that is updated as industry expectations change and as new research becomes available, the current Code has been expanded to reflect changing safety and integrity needs.<sup>89</sup> The current Code addresses 1) injury reporting and prevention; 2) a safer racing environment; 3) medication and testing; 4) jockey safety and health; 5) aftercare for retired horses; and 6) wagering security.<sup>90</sup> Below, is a brief overview of each of the principal components of the Code, as it currently exists.

#### *(a) Injury and Fatality Reporting and Prevention*

The Code requires the timely and accurate reporting of injuries and fatalities for the purposes of building and maintaining a national database that can be studied and analyzed to identify the causes of horse injuries and fatalities, and for determining what precautions are necessary to lessen the incidence and severity of horse injuries.<sup>91</sup> Once accredited, Alliance members are required to immediately begin reporting injuries sustained and fatalities suffered at the member's track, including race periods and non-race periods.<sup>92</sup> It is intended that The Jockey Club's existing Equine Injury

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> CODE OF STANDARDS (2009), *supra* note 82.

<sup>89</sup> CODE OF STANDARDS (2011), *supra* note 9, at 2. For Racetrack Alliance Members that received accreditation under the original 2009 Code, these members will be permitted to continue complying with the original 2009 Code until the expiration or revocation of their applicable twenty-four (24) month accreditation period. Thereafter, upon re-accreditation, the members will be required to comply with the revised version of the Code in effect at the time.

<sup>90</sup> *Id.*

<sup>91</sup> See CODE OF STANDARDS (2011) at § 1.

<sup>92</sup> See CODE OF STANDARDS (2011) at § 1(A). "Race Period" is defined as "the time period from the entry of a horse in a race through release of a horse from post-race testing." *Id.* at 5. The term "Non-Race Period" is defined as "any day or period of time not part of a Race Period." *Id.* at 4.

Database will be used for this purpose.<sup>93</sup> With continued and comprehensive maintenance of the database, nationwide statistics can be extracted and made available to the public from time to time for purposes of measuring progress in achieving greater safety. As a result, the public's confidence in the injury reporting process and the integrity of the sport will increase.

Further, the Code mandates, as a condition of accreditation, thorough and comprehensive pre- and post-race examinations by qualified veterinarians to ensure that all horses entered to race and returning from races are medically fit to continue racing.<sup>94</sup> Post-race inspections of all horses returning from every race are utilized to determine if the returning horses are injured, lame, or unsound.<sup>95</sup> In addition to pre- and post-race examinations, the Code requires that post-mortem veterinary examinations be performed on all horses that die or are euthanized at an accredited racetrack.<sup>96</sup>

The required pre-race examinations that accredited tracks or their respective state regulatory authorities must conduct are substantially similar, in form and substance, to RCI Model Rule ARCI-011-030(A).<sup>97</sup> If an accredited track's state regulatory authority is not conducting compliant pre-race exams, the track must petition its state regulators to adopt the mandatory pre-race inspection protocol referenced above to keep its accredited status.<sup>98</sup> This advocacy requirement is imposed on Alliance accredited tracks for this and several other requirements found in the Code because it is an essential element of the Alliance's objective to create greater uniformity among state regulatory authorities.<sup>99</sup> Further, advocacy provisions encourage the state authorities to be actively engaged in the accreditation process so that the state can and will utilize its legal enforcement rights to encourage compliance. The state's unique ability to punish non-compliance also adds credibility to the Alliance process.

Horses that fail such pre- and post-race examinations are to be added to a maintained veterinarians' list, complying with RCI Model Rule ARCI-011-030(B), that includes the names of all horses that are determined to be unfit to compete in a race due to illness, physical distress,

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<sup>93</sup> See CODE OF STANDARDS (2011) at § 1(A).

<sup>94</sup> *Id.* § 1(B)-(C).

<sup>95</sup> See CODE OF STANDARDS (2011), *supra* note 9, at § 1(B)-(C).

<sup>96</sup> *Id.* § 1(D) Such Post-Mortem Veterinary Examinations are to be conducted in compliance with the AAEP Guidelines for Necropsy of Racehorses.

<sup>97</sup> *Id.* § 1(B)-(C); see also MODEL RULES OF RACING § 11-030(A) (Ass'n of Racing Comm'rs Int'l 2002), available at <http://www.arci.com/modelrules.html>.

<sup>98</sup> CODE OF STANDARDS (2011), *supra* note 9, § 1(B).

<sup>99</sup> See *id.*

unsoundness, infirmity, non-permitted medication, or any other medical condition.<sup>100</sup>

*(b) The Creation of a Safer Racing Environment*

The Alliance has taken the lead in promoting the creation of a safer racing environment for everyone involved in the sport including the horses, jockeys, handlers, gate stewards, trainers, owners, and fans.<sup>101</sup> The Alliance, and its members, has made a public commitment to encourage the horse racing industry to collectively invest in the modernization of its existing infrastructure and in the design of new practices to create a safer racing environment for all parties involved. To that end, as a condition for accreditation, Alliance certified tracks are required to advocate for and adhere to various safety measures related to horse shoes and hoof care; riding crops; safety equipment, including helmets and safety vests; substance abuse and addiction policies; safety research; safety training and continuing education; uniform national trainers testing; catastrophic injury planning and procedures; infectious disease management; fire safety planning and procedures; paddock safety; safety committees; and veterinary care.<sup>102</sup>

*(c) Medication and Testing*

The Alliance advocates for the adoption of a national uniform policy governing the use of drugs and therapeutic medications for horse racing.<sup>103</sup> It does so to better facilitate the training and racing of horses in multiple states.<sup>104</sup> Without proper pre- and post-race drug and medication testing and related security procedures, the safety of the sport's participants, the wagering public, and the integrity of the sport itself cannot be guaranteed. Therefore, the Code includes standards covering, among other things, uniform medication rules and penalties; alkalinizing substances; exogenous anabolic steroids; shock wave therapy; out of competition testing; frozen sample testing; laboratory quality assurance; security assessments and training; and the establishment of medication and testing education committees.<sup>105</sup>

Alliance accreditation is also conditioned on certified tracks petitioning local regulatory authorities for the adoption and implementation

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<sup>100</sup> *Id.* § 1(E).

<sup>101</sup> *Id.* § 2.

<sup>102</sup> *Id.* § 2(A)-(N).

<sup>103</sup> *Id.* § 3.

<sup>104</sup> CODE OF STANDARDS (2011), *supra* note 9, § 3.

<sup>105</sup> *Id.* § 3(A)-(I).

of uniform rules regulating the use of drugs and therapeutic medications, as well as uniform minimum penalties consistent with ARCI Model Rules based on Racing and Medication Testing Consortium (the “RMTC”) recommendations.<sup>106</sup> To the extent that drugs and therapeutic medications are not regulated by the states, accredited members must advocate for the adoption of such rules and penalties to do so.<sup>107</sup> Again, where rules are not consistent with national standards, advocacy is required for accredited tracks to maintain accreditation.

Under the Code, at the time of application for Alliance accreditation, tracks must submit a proposed plan for prohibiting and testing for the use of alkalinizing substances in a manner consistent with RMTC recommendations.<sup>108</sup> Likewise, the prohibition on the use of exogenous anabolic steroids in training and in competition must also be consistent with RMTC recommendations.<sup>109</sup> In racing jurisdictions where alkalinizing substances and exogenous steroids are not already regulated, Alliance accredited tracks are required to advocate for the adoption of such rules by their respective local regulators.<sup>110</sup>

The Alliance also supports uniform drug testing standards.<sup>111</sup> Alliance accredited tracks must advocate for the official testing laboratories in their respective jurisdictions to participate in an externally approved Quality Assurance Program.<sup>112</sup> Currently, there are eighteen different laboratories in the United States that serve a combined thirty-eight different racing jurisdictions.<sup>113</sup> Despite serving the same purpose, there is significant variation in the quality and type of tests performed at these facilities,<sup>114</sup> which is a result of the decentralized regulatory model that exists today. Through the efforts of the RMTC and Alliance accredited tracks, the racing industry is attempting to establish consistent reference, research, and testing laboratories.

#### *(d) Safety and Health of Jockeys*

In addition to protecting the safety and health of equine athletes, the Code also includes multiple standards that focus on the safety and health of

<sup>106</sup> *Id.* § 3(A).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* § 3(B).

<sup>109</sup> *Id.*

<sup>110</sup> CODE OF STANDARDS (2011), *supra* note 9, § 3(B)-(C).

<sup>111</sup> *Id.* § 3.

<sup>112</sup> *Id.* § 3(G).

<sup>113</sup> Alan Foreman, Chairman & CEO, Thoroughbred Horsemen’s Ass’n Inc., Address at the Jockey Club Annual Round Table Conference: Drug Testing Initiative (Aug. 22, 2010) (transcript available at [http://www.jockeyclub.com/roundtable\\_08.asp?section=10](http://www.jockeyclub.com/roundtable_08.asp?section=10)).

<sup>114</sup> *Id.*

jockeys.<sup>115</sup> As described in the Code, Alliance accredited tracks must adhere to specific standards relating to jockey weight, jockey scale of weights, jockey health information system, and other pertinent jockey qualifications.<sup>116</sup> Accredited tracks must adhere to provisions governing ambulance support, medical care, insurance, and disability support in an accredited track's racing jurisdiction.<sup>117</sup>

*(e) Aftercare for Retired Horses*

Guidelines are also provided in the Code for the aftercare and transition of retired racehorses.<sup>118</sup> To join the Alliance, Members must acknowledge their responsibility to provide care and retraining for racehorses after they can no longer compete on the racetrack.<sup>119</sup> The Code goes further and calls for Alliance accredited tracks to affiliate with recognized placement and adoption programs that satisfy criteria established by the American Association of Equine Practitioners.<sup>120</sup>

In support of this goal, accredited tracks must assist in the transfer of their horses to recognized placement and adoption programs by taking steps such as, but not limited to providing owners and trainers with contact information for recognized placement and adoption programs, promoting placement and adoption programs, cooperating with state funded programs, and providing stalls and/or staff to help facilitate the transfer of horses to affiliated recognized placement and adoption facilities.<sup>121</sup>

Recently, a broad-based group of Thoroughbred industry stakeholders announced the establishment of the Thoroughbred Aftercare Alliance (TAA), which is intended as both the accrediting body for aftercare facilities that care for Thoroughbreds following the conclusion of their racing careers and a fundraising body to raise financial support for approved facilities.<sup>122</sup> The Alliance has worked closely with the organizers of the TAA and will be a major supporter of the effort going forward.<sup>123</sup> Consistent with the evolutionary nature of the Code, there is no doubt that the next version of the Code will include enhancements to this section

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<sup>115</sup> CODE OF STANDARDS (2011), *supra* note 9, § 4.

<sup>116</sup> *Id.* § 4(A)-(D).

<sup>117</sup> *Id.* § 4(E)-(H).

<sup>118</sup> *Id.* § 5.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> CODE OF STANDARDS (2011), *supra* note 9, § 5.

<sup>122</sup> Blood-Horse Staff, *Thoroughbred Aftercare Alliance Formed*, BLOODHORSE.COM (Feb. 13, 2012), <http://www.bloodhorse.com/horse-racing/articles/67383/thoroughbred-aftercare-alliance-formed>.

<sup>123</sup> *Id.*

related to support for the TAA. In particular, the Alliance will likely support the TAA in its efforts to educate owners about the responsibilities of horse ownership and about the various options for retiring their horses once their racing careers are over.

*(f) Wagering Security*

The Alliance also requires a high degree of wagering security to ensure public confidence in the pari-mutuel wagering system.<sup>124</sup> To uphold the integrity of the betting process, Alliance accredited tracks must incorporate stop wagering devices and a hierarchical system responsible for stop wagering.<sup>125</sup> Every simulcast sales contract of an accredited track must stipulate that the accredited track has the right to request and receive transactional data, including, but not limited to, tickets sold, tickets canceled, and time verifications.<sup>126</sup> A variety of other wagering incident prevention protocols must also be adopted to mitigate wagering issues and to guarantee that the system operates efficiently and effectively.<sup>127</sup>

Furthermore, the Code sets forth wagering incident investigation protocols where accredited tracks must promptly conduct a thorough investigation of any and all suspected wagering incidents.<sup>128</sup> Accredited tracks must notify the appropriate regulatory authority after an incident has occurred, and must provide transactional data and video of the race to other investigatory entities when reasonably requested.<sup>129</sup> Additionally, accredited tracks must disclose any incidents to the public, unless an ongoing investigation would be compromised.<sup>130</sup> Reporting mechanisms have to be implemented for wagering incidents that are easily accessible to the wagering public and employees who might have knowledge of the occurrence of a wagering incident. To mitigate wagering incidents, accredited tracks must adopt minimum requirements for wagering entities to be permitted access to their simulcast wagering pools. Each accredited track must also guarantee that wagering entities maintain proper licensing and the requisite qualifications.<sup>131</sup>

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<sup>124</sup> CODE OF STANDARDS (2011), *supra* note 9, § 6.

<sup>125</sup> *Id.* § 6(A)(1).

<sup>126</sup> *Id.* § 6(A)(2).

<sup>127</sup> *See id.* § 6(A).

<sup>128</sup> *Id.* § 6(B)(1).

<sup>129</sup> *Id.* § 6(B)(2).

<sup>130</sup> CODE OF STANDARDS (2011), *supra* note 9, § 6(B)(3).

<sup>131</sup> *Id.* § 6(C).

#### 4. *The Alliance Provides Flexibility*

The Alliance is a flexible and evolving solution that is annually updated to reflect changing circumstances. Not only does it provide a degree of national uniformity without federal regulation, it also provides a cooperative industry solution to the varying and often inconsistent state regulations. Additionally, the Alliance aims for transparency by issuing annual public reports to monitor the progress of achieving Alliance objectives.<sup>132</sup> Further, the Alliance provides regular, public communications with horse racing fans, regulators, legislators, and industry stakeholders to maintain transparency.<sup>133</sup>

With standards covering medication and testing, injury reporting and prevention, safety research, and a safer racing environment, the Alliance represents the highest degree of uniformity for equitable standards made by horsemen, for horsemen. Although the horse racing industry is composed of many different racing stakeholders, the Code promulgated by the Alliance unites all racing members under one general set of principles that are flexible and ever evolving. In fact, Alliance members may petition for amendments to the Code as new research becomes available or public sentiments change.<sup>134</sup>

#### 5. *The Alliance Provides an Affordable Solution*

The Alliance pursues cost effective means for implementing and enforcing the Code in each racing jurisdiction. Based on a collective agreement for spreading the costs evenly throughout the industry, Alliance accredited tracks assume the responsibility of contributing to the overall costs of supporting and maintaining the Code.<sup>135</sup> While the Code does not specifically address allocations of cost, it recognizes that costs will differ depending on location and need.<sup>136</sup> Accordingly, costs will be addressed at the local level through the normal contractual or regulatory process to ensure that each racing jurisdiction pays the appropriate costs relative to their desires. This is a realistic solution that avoids the unreasonable expenses that come from overly bureaucratic federal regulation.

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<sup>132</sup> See *id.* § III(B) (stating that Alliance will review audit and review its members).

<sup>133</sup> *NTRA Safety and Integrity Alliance Pledge*, NAT'L THOROUGHBRED RACING ASS'N, available at <http://www.ntra.com/images/NTRASafetyAndIntegrityInitiativePledge.pdf> (last visited Apr. 1, 2012).

<sup>134</sup> CODE OF STANDARDS (2011), *supra* note 9, at 2 (Nat'l Thoroughbred Racing Ass'n Safety & Integrity Alliance 2011).

<sup>135</sup> *Id.* at 3.

<sup>136</sup> *Id.*



### 6. *The Standards Advocated by the Alliance are Enforceable*

The Alliance does not rely solely on the voluntary commitment of its Members to achieve compliance with the Code. Like other SROs, the Alliance assures compliance through a rigorous accreditation process.<sup>137</sup> In order to achieve accreditation, tracks must submit an extensive application, along with supporting documentation.<sup>138</sup> An assessment team then reviews the application and conducts an extensive onsite inspection to ascertain that the information provided is accurate.<sup>139</sup> The validation process consists of interviews of key racetrack personnel, firsthand observation of racetrack operational procedures, and review of any additional relevant information not previously provided. Assessment teams receive unfettered access to the racetrack premises, personnel, equipment, and documentation in the course of their review.<sup>140</sup> A separate aftercare committee of the Alliance conducts an assessment of each track's aftercare program to confirm compliance with the Code's aftercare criteria.<sup>141</sup> The assessment team then grades the track application according to each criterion.<sup>142</sup>

To receive full accreditation, the track must receive a grade of "satisfactory" or better on all of the critical application criteria.<sup>143</sup> Tracks receiving one or more "less than satisfactory" grades are provided the opportunity to take immediate corrective action.<sup>144</sup> Failure to correct the problem may result in a conditional accreditation or the denial of an accreditation application, depending on the severity of the problem and the steps necessary to correct the problem promptly.<sup>145</sup> Accreditation lasts for a maximum of two years, subject to the maintenance of an approved compliance program to assure continued compliance throughout the entire accreditation period.<sup>146</sup> Failure to maintain compliance can result in the revocation or suspension of accreditation prior to the end of the accreditation period.<sup>147</sup>

Alliance accreditation has quickly become an important seal of approval for tracks attempting to demonstrate to the public their commitment to safety and integrity. The quality of tracks that have quickly

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<sup>137</sup> See *id.* § III(B) (providing the conditions for accreditation).

<sup>138</sup> *NTRA Safety and Integrity Alliance Pledge*, *supra* note 133; see also THOMPSON, *supra* note 85.

<sup>139</sup> THOMPSON, *supra* note 85, at 3.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See THOMPSON, *supra* note 85, at 4.

<sup>146</sup> *Id.* at 10.

<sup>147</sup> See CODE OF STANDARDS (2011), *supra* note 9, at 3.

embraced the Alliance and its accreditation process speaks volumes about the value of the certification. The inability to gain accreditation and/or the loss of accreditation once achieved is sufficient punishment to encourage compliance. Nonetheless, the added benefit of state regulatory involvement gives added meaning and impact to non-compliance. Tracks that fail to drug test or perform pre-race inspections not only risk the loss of their accredited status, but in many cases they also risk the loss of their license to conduct pari-mutuel horse racing.

### *7. The Alliance Promotes National Uniformity*

In every instance where industry participants have agreed upon safety and integrity matters, the goal is national uniformity. The very purpose of the accreditation process is to determine compliance with the national standards, as set forth in the Code. Consequently, non-compliance, in and of itself, is not always the basis for denial of accreditation. In many circumstances, the state regulations simply do not exist to support accreditation, but because the larger goal is the adoption of regulatory uniformity, the Code provides an advocacy exception.<sup>148</sup> In relevant part, the Code states:

Notwithstanding anything in this Code to the contrary, the inability of a Member to comply with any provision of this Code due to contrary legislative or regulatory enactment shall not be the basis for denial or revocation of accreditation so long as the Member petitions the legislative or regulatory authority and diligently seeks to amend the contrary provisions to bring it into conformity with the Code.<sup>149</sup>

Additionally, the Alliance-based model incorporates house rules, ACRI model rule development procedures, and uniform model rule adoption at the state level to effectuate the implementation of the Code.<sup>150</sup> In this way, the accreditation of the Alliance's racing Members supports and strengthens the state regulatory structure.

For example, Churchill Downs in Louisville, Kentucky adopted the use of a cushioned riding crop in the form of a private racetrack mandate or house rule. The house rule process was necessary because the Kentucky Horse Racing Commission had not yet made use of a cushioned crop as a

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

statutory requirement as required by Section 2B of the Code. To be accredited, Churchill had to petition the Kentucky Horse Racing Commission to adopt a regulatory requirement regarding cushioned crops. As a direct result of the petition, a cushioned crop rule was adopted in Kentucky soon thereafter.

Churchill Downs was also required to petition the Kentucky Horse Racing Commission to adopt a rule allowing for out-of-competition testing to be conducted on horses racing in Kentucky to satisfy Section 3E of the Code. As a result of advocacy by Churchill (and other accredited Kentucky tracks,) the Kentucky Horse Racing Commission adopted an out-of-competition testing rule in the summer of 2010.

Pimlico Racetrack in Baltimore, Maryland, sought Alliance accreditation in the spring of 2009, but because it failed to meet all of the standards for accreditation outlined in the Code, Pimlico was provisionally accredited. To be fully accredited, Pimlico and Maryland Racing Commission had to make changes to their medication rules to bring them in line with the ARCI Model Rules. As a result, the Maryland Racing Commission has adopted or is in the process of adopting: (1) pre-race sampling protocols for alkalinizing substances as part of its drug testing program; (2) out-of-competition testing; and (3) frozen sample testing.<sup>151</sup> Consequently, Pimlico has been awarded full accreditation status.<sup>152</sup>

In fact, since the Alliance's first accreditation in April 2009, every accredited track has been required to make changes, and in almost every instance, those changes have come, at least in part, as the result of cooperation and support from state regulators. These positive changes are occurring rapidly, but not without significant deliberations among affected stakeholders. All of these changes point out an important fact: Accreditation is not a purely voluntary act. Accreditation requires constructive engagement by tracks and horsemen with state regulators in which all parties agree to adopt permanent standards and practices. The end result is institutionalized change on a nationwide basis.

### *8. The Alliance is Available Now*

As stated above, twenty-four tracks in the United States and Canada have been accredited as being in compliance with the Alliance Code.<sup>153</sup> These include some of the largest and most visited tracks in the United States.<sup>154</sup> Importantly, this also means that regulatory authorities in

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<sup>151</sup> See THOMPSON, *supra* note 85, at 5-6.

<sup>152</sup> See *id.* at 5.

<sup>153</sup> *Id.* at 4-5.

<sup>154</sup> *Id.*

some twelve states are knowledgeable, cooperative, and supportive of the Code and its standards. As more tracks in additional states go through the accreditation process, the goal of uniformity will be advanced. In the end, the Alliance is an option that is available now, regardless of the regulatory environment or commitment to uniformity and it has proven to have an efficient and effective impetus for nationwide change.

### *9. The Alliance is Responsive to Public Concerns*

Not only is the Alliance immediately available, it is responsive to public concerns and addresses more than regulatory oversight. It represents an industry-wide commitment not only driven by government mandate, but also by sincere motive for the safety and integrity of the sport. Many of the Code provisions, like the funding of safety research and the support for aftercare organizations, transcend regulatory mandates. The goal is not simply to improve the way our industry is regulated and governed but also to strengthen the public's confidence in our industry's commitment to safety and integrity as a whole.

## VII. CONCLUSIONS

To the question frequently asked of horse racing, whether the sport is capable of making meaningful and positive reforms without external intervention, the answer is a resounding "Yes." Horse racing does indeed have the will and structure to accomplish the reforms necessary to respond to the public's demands for change. The NTRA's Safety and Integrity Alliance is well positioned to facilitate the adoption of changes needed for horse racing to grow and flourish in the future. By encouraging national uniformity based on industry developed and agreed to minimum standards through a rigorous accreditation, compliance, and enforcement program, the industry is already changing for the better in many respects. But accreditation is more than a voluntary act. Accreditation demands constructive engagement by tracks and horsemen with state regulators to make sure that Alliance standards and practices are incorporated into each state's regulatory framework. With twenty-four racetracks in the United States and Canada now accredited, the only question that remains is why more tracks are not being accredited. Once industry leaders, including owners, trainers, and horseplayers, begin supporting accredited tracks with their horses and their wagered dollars, the move to accreditation will be complete. The Alliance, once firmly established, will be the horse racing industry's best opportunity for bringing about meaningful and significant reforms to the sport of horse racing today.

