

**NYS Gaming Commission - Public Meeting Transcript**

October 3, 2023 2 p.m.

633 3<sup>rd</sup> Avenue, 37<sup>th</sup> Floor Board Room, New York, NY

**Executive Director Robert Williams:** New York State Racing, Pari-Mutuel Wagering and Breeding Law § 102 provides that the New York State Gaming Commission shall consist of seven members appointed by the Governor by and with the advice and consent of the Senate. Four members being confirmed by the New York State Senate are necessary to afford the Commission an ability to establish a quorum and undertake action.

This present meeting of the Commission is now called to order.

Ms. Secretary, will you please call the roll?

**Acting Secretary Kristen Buckley** (via video): John Crotty

**Commissioner John Crotty:** Here.

**Kristen Buckley:** Sylvia Hamer

**Commissioner Hamer:** Here

**Acting Secretary Kristen Buckley:** Peter Moschetti

**Commissioner Moschetti:** Here

**Acting Secretary Kristen Buckley:** Brian O'Dwyer

**Chair Brian O'Dwyer:** Here.

**Kristen Buckley:** Marissa Shorentsein

**Kristen Buckley:** Jerry Skurnik

**Commissioner Jerry Skurnik:** Here.

**Robert Williams:** Ms. Secretary, please have the record reflect the quorum of established members is present, thus enabling the transaction of business.

**Chair O'Dwyer:** Minutes of the Commission meeting conducted on August 3 2023, have been provided to the members in advance. At this time, I'd like to ask the members if there are any edits, corrections or amendments. Hearing none, Ms. Secretary, please let the record reflect the minutes were accepted. I now call on our Executive Director Mr. Williams to give his report;

**Robert Williams:** Chairman O'Dwyer asked that I address the process and decision making that surrounded the Pick-5 wagering at Saratoga Race Course on August 6, 2023. He also requested that I discuss the number of equine fatalities that occurred during this past summer's racing meet at the Saratoga Race Course, placing the meeting in historical context, discussing the Commission's responsibility in this day of the Horseracing Integrity and Safety Authority, outlining what efforts have been undertaken to examine the situation and identifying, to the extent possible, any root cause.

With respect to the Pick-5 issue, on August 6, 2023 NYRA programmed a late Pick-5 commencing with the sixth race. The morning card had the first and third legs running on dirt, while legs two, four and five were scheduled for the turf. As horses were loading into the gate for first leg, NYRA announced that, due to weather conditions, all racing for the remainder of the card would be taken off the turf, meaning legs two, four and five would be transferred to the dirt. The late notice of the transfer meant horseplayers had little time to cancel or change their Pick-5 tickets, as the first leg – race six – went off at its scheduled time. The Commission's Pick-5 Rules require that races changing surfaces after a betting pool has closed are considered all-win races. Accordingly, the first and third legs remained, while legs two, four and five were all-win. The late Pick-5 ultimately returned \$25 for a 50-cent bet.

NYRA President and Chief Executive Officer David O'Rourke publicly suggested they failed to timely make the call to take three races off the turf. To make amends, NYRA seeded the late Pick-5 pool on August 12th with \$100,000.

The Commission involvement with the Pick-5 issue was two-fold: First, Mr. O'Rourke indicated that NYRA had requested the stewards to delay the start of the first leg, but that request was denied. Second, Mr. O'Rourke also indicated an intention to refund all wagers but that NYRA was not allowed to do so.

With respect to the former, NYRA did not make their request to delay the start of the first leg until two horses had already been loaded into the starting gate. It's important to recognize the conditions of this particular race – a Maiden Special Weight for two-year old fillies. Nine fillies were entered, and review of their histories finds that seven of the nine had never even run in a race. In other words, this was their first experience in a starting gate with other horses in front of spectators.

The stewards, considering the fractious and unpredictable nature of inexperienced two-year olds, recognized that backout out the two horses already loaded in the gate and then delaying the start by the requested ten minutes was unsafe. Hence, they declined to do so. The stewards appropriately put the safety of the horses, the gate crew and the jockeys first.

As to the latter, NYRA could not cancel the entire wager and refund tickets, as wagers were properly booked, and the wager was being undertaken under existing rules. A cancellation of the wager would have disturbed individuals who ultimately correctly picked the winners of the first and third legs. NYRA, had it chosen to do so, could have refunded using their own money the full value of all patrons making wager via account wagering.

Earlier this year, the federal Horseracing Integrity and Safety Authority, or HISA, took responsibility for Thoroughbred racing nationwide. While much attention has been focused on Anti-Doping and Medication Control rules and testing, the Act also places racetrack and horse safety squarely under their responsibility.

In the arena of thoroughbred equine health and safety, the Commission plays a complementary role to HISA. The Commission continues to be responsible for the award of race days to licensed and franchised racetracks, and we continue to license racetrack management, who are ultimately responsible for the conditions of their racetrack, and trainers, who are responsible for the health and safety of their horses.

That said, Commission staff, HISA personnel and NYRA employees have worked cooperatively on issues relative to the Saratoga equine deaths, as we share common interests: the continued health of the equine participants and their riders and the safety of racing surfaces.

Looking at the Saratoga meet in historical context; this year was not outside the norm. Overall, in 2023 Saratoga experienced a total of 13 racing and training fatalities. Over the last ten years, the gross number of racing and training fatalities have ranged from a high of 19 in 2017 to a low of 11 in 2018 and 2015. The last five years before this year experienced 12, 12, 16, 12, and 11 racing and training fatalities.

Using the well-established and statistically accurate metric of racing deaths per 1,000 starts, since 2009, the number of racing fatalities per year at Saratoga has ranged from three to eight per year. This past meet saw 9 racing fatalities in 3,171 starts, resulting in an equine death rate of 2.84 per 1,000 starts. Previous years have seen rates range from of a low of 0.9 racing fatalities per 1,000 starts in 2021 and 2022 to a high of 2.4 racing fatalities per 1,000 starts in 2017.

Since Saratoga opened for training this April and through the end of the Meet, in 11,219 timed workouts there have been four training fatalities. All on the main track and none at Oklahoma. This corresponds to a fatality rate of 0.35 per 1,000 timed workouts. This rate is the lowest in the last ten years, which has seen training fatality rates ranges between a low of 0.59 in 2016, 2018 and 2019, to a high of 1.2 in 2020.

I feel it necessary to note that the Commission's publicly posted equine breakdown numbers track higher than The Jockey Club's posted number, as the Commission tracks a racehorse over time. If the Commission Equine Medical Director determines a fatality is a direct result of an injury sustained during the horse's most recent race, regardless of time, the death is classified as a "racing" fatality. The Jockey Club's Equine Injury Database only counts fatalities that occur within 72 hours of a race.

For instance, the horse *La Aguililla* competed in the 2nd race at Saratoga on August 25, 2023. After finishing fifth, jockey Manny Franco quickly pulled the horse up. The horse was subsequently vanned off and after a week was transferred to Rood and Riddle Saratoga. Despite being under excellent veterinary care, the horse continued to decline resulting in it being humanely euthanized on September 13, 2023. The Commission accounts for this horse as passing due to racing injury, while The Jockey Club does not.

As has been the practice in New York for the past 10 years, all equine fatalities at New York racetracks are reviewed in an effort to identify risk factors that may have contributed to those injuries. Over the years, numerous interventions have been put in place to improve safety at our racetracks. Rigorous application of this racing risk management program has reduced the incidence of equine fatalities at New York racetracks by nearly 50 percent over the past decade.

New York's goal is zero equine fatalities. Risk Management is an ongoing, iterative process that includes:

- Performing a risk assessment to identify risk factors.
- Implementing interventions to address those risk factors.
- Monitoring metrics to determine if interventions are successful; and
- Modifying current interventions or implement new interventions as required to address changes in risk.

At this point, I'd like to turn this discussion over to Dr. Scott Palmer, the Commission's Equine Medical Director. Dr. Palmer has been working with HISA and NYRA regarding the Saratoga fatalities and can shed light on recent theories and developments ...

Scott –

**Dr. Scott Palmer:** Thank you Rob. Any equine fatality at New York racetracks – while racing, training or otherwise – is investigated to identify any risk factors that may have contributed to the deaths. Each horse is sent to Cornell University’s College of Veterinary Medicine for necropsy. Necropsy findings, exercise history, medical records, weather, racing surface conditions and any other factors that are likely to have contributed to the fatality are reviewed. At this time all 17 of the equine fatalities that occurred at the Saratoga Race Course in 2023 are under review.

Each year, there are approximately 1,800 horses on the grounds or in private stables adjacent to the Saratoga Race Course during the late July-Labor Day meet. Several hundred more horses reside on the grounds for training purposes, generally between April and November.

In 2023, a total of 17 horses – or 1% of the approximately 2,000 horses stabled at Saratoga died on Saratoga Race Course property. This number is consistent with 2012, 2016 and 2019 figures. For reference, in 2017 and 2020: 21 horses died on the grounds of Saratoga Race Course.

Of note, the U.S. Department of Agriculture’s National Animal Health Monitoring System surveys private farm owners across the country as to how many horses, mules and donkeys are on their grounds. To be clear: these are not racehorses. They are equids that are living and/or working on farms across the US. The survey asks farm or stable owners how many of their horses, mules or donkeys died during the past year. The most recent survey listed a mortality rate of 1.4% - statistically higher, if not comparable with the mortality rate of racehorses at Saratoga. These statistics indicate that horses that race in New York are as safe if not more so than those that live on farms in non-racing capacities.

Most exercise-associated equine fatalities are the result of musculo-skeletal injury. These tragic incidents rarely have a single cause. Numerous individual horse and environmental risk factors are currently under review.

Although the total number of equine fatalities at Saratoga in 2023 was statistically similar to previous years, the number of racing fatalities in 2023 was 3 times higher than that seen in 2021 and 2022. Of note: they were “clustered” around the Whitney and Travers weekends. When investigating factors that may have contributed to an unusual increase in injuries, it is appropriate to determine what risk factors or circumstances were common to previous years of experience and what risk factors were unique to the period in which the injuries occurred.

Many of the individual horse risk factors common to the horses that experienced exercise-associated fatalities during the 2023 Saratoga Race Meet were similar to those of previous years.

For those horses that suffered exercise-associated fatalities: one commonality has been the type of injury. The fetlock joint is the most common site of fatal musculoskeletal injury in racehorses across the United States. Published research studies of racehorse injury in both New York and California over the past 10 years found that fetlock injuries represented 48% and 50% of fatal musculoskeletal injuries respectively.

However, during the 2023 Saratoga race meet, fetlock joint injuries represented 92% of all the exercise-associated fatal musculoskeletal injuries during the meet. This is a significant finding.

Another commonality: 12 of the 13 exercise-associated injuries occurred in the final furlongs of the race or as horses were galloping out after the race. This finding suggests that fatigue was likely a factor that contributed to these injuries.

In terms of environmental risk factors, the most significant finding was the unprecedented amount of rainfall (11 inches) that occurred during the 2023 Saratoga race meet, compared with 9 inches in 2021 and 8 inches in 2022.

“Surface change” is the term used to describe a situation where the amount of moisture in the turf courses is determined by racing officials to represent an unacceptable risk to the safety of horse and rider and would likely result in irreparable damage to the turf course itself. For that reason, the number of “surface changes” is a useful metric to quantify inclement weather. During the 2023 Saratoga Meet there were 65 surface changes (16% of the races were moved off the turf onto the dirt), compared with 17 surface changes (4% of the races) during the 2022 Saratoga Race Meet. Given these dramatic and unique findings, moisture content of the racing surfaces at Saratoga has become a primary focus of the investigation.

Existing research has found no correlation between the surface condition of the racetrack and exercise-associated catastrophic injury. In one recent study, the incidence of catastrophic injury was compared among racetracks classified as “fast,” “sloppy” and “muddy.” No significant difference was found. However, it is important to understand that these classifications are assessments by racing officials and are not based upon actual measurement of the amount of moisture in the racing surface.

Consistency of the racing surface is the primary goal of racetrack maintenance. A consistent surface is considered a safe surface. The variables that contribute to

consistency and safety of the racetrack include composition of the surface material, design of the oval, and moisture content. Only one of these variables can change within a short time frame: moisture content.

Analysis of variance (ANOVA) is a statistical test is used to measure variation (inconsistency) in a data set. In addition to comparing the average value of multiple data points, ANOVA tests compare the range and distribution of data points within minimum and maximum values in a group of numbers. The moisture content of the main dirt racetrack was evaluated using this type of analysis.

During the 2023 Saratoga Race Meet multiple measurements of the percent volume moisture content (VMC) were made twice daily at 15 points around the dirt main track and 12 points around the Mellon and Inner Turf Courses.

There were 2 exercise-associated racing fatalities on the dirt main track during the 2022 Saratoga Race Meet when the spatial and temporal distribution of moisture in the racetrack was relatively consistent.

Conversely, there were 4 exercise associated racing fatalities on the dirt main track the during the 2023 Saratoga Race Meet, when the spatial and temporal distribution of the moisture content of the racetrack was significantly less consistent.

This finding suggests that increased moisture in the Saratoga main dirt track and spatial and temporal variation of the moisture content of the track during the meet were likely contributing factors to the increase in the number of racing fatalities during the 2023 Saratoga Race Meet.

In sum, the comprehensive investigation of the 2023 Saratoga Race Meet fatalities by HISA, NYRA and NYSGC veterinarians is ongoing and has thus far identified the following preliminary findings:

- Fetlock hyper-extension injuries comprised 92% of the musculoskeletal injuries that occurred during the 2023 Saratoga Race Meet.
- Fatigue was a factor in all but one of the exercise-associated injures, as they occurred in the final furlongs of the race or as horses were galloping out after the race.
- The unprecedented amount of rainfall (11 inches) that occurred during the 2023 Saratoga Race Meet impacted the consistency of the racing surfaces.

A comprehensive report of this investigation will be made available to the public as soon as the investigation is complete.

**PET Scan Not Appropriate as Initial Screening Tool:** Recently, there have been conversations about possibly scanning all horses prior to racing with a Positron Emission Tomography (PET) scan.

(PET) scan is a form of “advanced” imaging that involves injecting a radioactive isotope into the body and then using a sensor to image the localization of that isotope in areas of the body with increased metabolic activity, such as bone modeling or bone remodeling. Because of its ability to detect active metabolic processes, it can often detect abnormalities in bone or soft tissue before those abnormalities can be detected with other imaging modalities, such as radiography, MRI or Computed Tomography (CT). As such, PET is a fantastic diagnostic tool. However, it is not the best initial screening tool to detect horses at risk for catastrophic injury.

Identification of horses at risk for catastrophic injury must begin with a screening protocol that can be scalable, practical, affordable, and can be used by every horse while training or racing without regard to any clinical indication of injury. Wearable biometric sensors are best suited to accomplish this first level of screening. These sensors detect subtle abnormalities in a horse’s gait that are not detectable with the human eye. They serve as a “check engine” light that alerts us to the possibility that there is something wrong with the horse and that the horse should be examined by a veterinarian.

The veterinary examination is the second level of screening for an abnormality that might predispose a horse to injury. The goal is to reach a diagnosis of musculoskeletal abnormalities and typically will include use of diagnostic nerve blocks and digital radiography. If lameness is detected in a limb during this examination and digital radiographs are inconclusive, then advanced imaging such as PET can be employed as a final screening step in this process.

The NYS Gaming Commission has been doing pioneering research with wearable biometric sensors to identify horses at increased risk for injury at NYRA racetracks for the past 3 years. The results are promising. Sensors were placed in the saddlecloths of racehorses racing at Saratoga, Belmont Park and Aqueduct in 2021 and 2022. These sensors measure acceleration in 3 dimensions during high-speed exercise. Thus far, this technology can identify horses at risk for injury, but wearable biometric sensors are not quite ready for “prime time” use at this time. Stay tuned for further developments.

In summary, PET can play a very important role in the diagnosis of subtle musculoskeletal injuries in horses, but it is not useful at the initial screening level.

**Chair O'Dwyer:** Thank you Dr. Palmer. I have a question or two. First question is I understand that the new Belmont is going to use artificial surface. I that going to have any effect on injury?

**Dr. Palmer:** Yes it will. I anticipate that it will. It's a little bit of a complicated story. The short version is that over the past decade synthetic surfaces have been installed but most of them have been removed since they were installed. We've learned a lot in the last ten years. They were purchased and installed with the thought in mind they would not require maintenance, but that is just not the case. And we know that those tracks do require maintenance and they change over time the material's composition evolved quite a bit. So the current plan would be to install an improved version over the ones that were originally installed so I want to make it clear that we're not talking about the same tracks that were put together about 10 years ago now over the last 10 years though there's absolutely incontrovertible evidence that these synthetic surfaces are safer in terms of categorizing catastrophic injury than on any other type of racetrack the fatality rates are lower they're lower than dirt they're lower than Turf now the uh potential installation of a synthetic surface at uh Belmont in particular is really already underway and it's not going to replace the dirt or the turf courses but it will be in addition to those courses it not only will have tremendous value in terms of making racing safer but will also give better options for conditions when the Inc is leather so the horses ordinarily would when they're taken off the turf they would scratch and not race on the dirt and with a synthetic surface though which is much more similar to Turf Than Dirt is most of them will stay in race so it's going to improve racing it's going to improve safety when those surfaces are put in place.

**Chair O'Dwyer:** Do any of the Commissioners have any questions?

**Commissioner Moschetti:** After the two factors that you pointed um the fetlock injury the fatigue factor so they had 92% of the injuries the fatalities were the result of a fetlock fracture a failure of the fetlock joint, why the fatigue and I guess second question is it related to the second factor that you pointed which is the rain and the uh increased moisture content?

**Dr. Palmer:** Yes, it is. So they are connected and the reason they're connected is that the racing surface has a base to it a firm base and then there's a cushion on top of the base excuse me the cushion is composed of 85% sand 15% silt and Clay now that composition is it's a very delicate balance in terms of getting the right surface tension in that cushion which allows the horse to interact most safely with the racing surface if you have too little water or too much water that creates unsafe conditions and uh just as an example if you walk across a racetrack at you know during the course of a meet and where when it's been raining or it's been watered aggressively if you're wearing loafers it'll suck the shoes right off your feet and so what that what we're getting to here is as that horse lands on the racetrack the

fetlock joint is hyperextended into the racetrack and when it's very wet the conditions of slipping or moving that around are quite different and as a horse picks a leg up to come out of the race track it's harder to do that while the body weights rotating over that joint he's being asked to lift it out of the surface and so if a horse is fatigued so those muscles aren't as strong as they ordinarily would be if the horse is sticking into the racetrack because of the water content then those horses are much more likely to have these injuries it doesn't mean that the racetrack is unsafe for any horse out there but it does mean if a horse has any particular confirmation or previous history or whatever training issues that would be more challenging under those environmental conditions and those are the horses that are going to have problem.

**Commissioner Moschetti:** Were you surprised by the 92%?

**Dr. Palmer:** I was shocked by the 92%. I have been doing this a long time. I have never seen anything like it now it's always high. 50% is a big number but to go from 50% to 92% is unheard of in my experience, at least not here in New York. Yeah that's why I asked you know what's the cause that's what you're trying to get the weather Y and it's the metrics that we're using to look at that are new and they're very exciting because when you compare averages there was no big difference in the percent of rainfall from one year to the next but rain doesn't fall uniformly and we have to look at rainfall differently we have to look at trends and rainfall we have to look at changes between morning and afternoon. We race in the afternoon we train in the morning we had no training fatalities on the Oklahoma Track in the morning we had four at Saratoga on the main track. So, again, there's only one thing that can change between morning and afternoon you can't change the geometry of the race track, it's got to be moisture so what the a major conclusion of the of this study this review is that not that we have an answer to that how to take care of that but it's a clear indication for aggressive research we done this looking at new ways to look at moisture trying to come up with numbers where we can determine safety and non-safe surfaces. And I think that's going to be hugely important make a wonderful contribution going forward so as horrible as this meet was I think it's going to lead to just like the Aqueduct situation it's going to lead to change that will improve racing going forward.

**Chair O'Dwyer:** Any other Commissioners? Thank you doctor

N.Y.S. Racing, Pari-Mutuel Wagering and Breeding Law § 104.19 authorizes the Commission to promulgate rules and regulations that it deems necessary to carry out its responsibilities. To that regard, the Commission will from time-to-time promulgate rules and rule amendments pursuant to the State Administrative Procedure Act. Today we have two rules for adoption consideration, and one rule for proposal. Before we commence discussion of these Items, I note that the Attending Veterinarian Examinations in Thoroughbred Racing proposal came off public comment on September

18, 2023 but was not advanced by staff today. I'd like Mr. Williams to provide an overview of why consideration of this rule has been deferred.

**Robert Williams:** Thank you. In July, the Commission proposed an amendment to Rule 4007.5, which concerns qualifications to start. The proposed regulation would require a thoroughbred trainer's attending veterinarian to examine a horse within 72 hours before a race, as well as within 72 hours before a workout, to determine the horse's fitness to participate in the race or workout, with the horse prohibited from entry into a race or from a workout unless such evaluation results in a determination that the horse is fit.

Since the rule was proposed, numerous circumstances have changed. First, during the latter portion of the Saratoga Meet, the Horseracing Integrity and Safety Authority required their veterinarians to be on-track during morning workout sessions. It is my understanding that these additional veterinarians intercepted numerous horses as they headed to or commenced morning exercised and discontinued the horse's ability to exercise.

Second, in the wake of the racing deaths at Saratoga, HISA required a HISA veterinarian post-entry soundness examination through the end of the meet. Historically, this post-entry examination had been allowed to be conducted by a local regulatory veterinarian. The requirement that a NYRA regulatory veterinarian perform a race day soundness examination remained.

Third, following the Commission's rule proposal, NYRA adopted a House Rule that accomplished much of the proposal. Namely, as a condition to, and in consideration for a trainer being permitted to race, conduct an official timed workout, or train any horse at Aqueduct Racetrack, Belmont Park or Saratoga Race Course, a trainer and trainer's attending veterinarian are required to have an entered horse examined by trainer's attending veterinarian during the three days immediately preceding the entry to the race for the express purpose of evaluating the horse's fitness to race, and been found fit to race by the attending veterinarian. A trainer is also prohibited to work a horse unless the horse has been examined by the trainer's attending veterinarian during the five days immediately preceding the work and has been found fit.

Uncertainty. Finally, while there is uncertainty whether the HISA veterinarian training presence will continue and whether HISA will continue to require their veterinarians conduct pre-race examinations, NYRA House Rules will remain in effect through December 31, 2023, at minimum.

In addition, the Commission received numerous public comments on the proposal. Some twenty-six comments were received: twelve from thoroughbred owners, nine from trainers; three from veterinarians; and two from horsemen's organizations. In

general, the comments congregate around three subjects: cost, effectiveness, and veterinary availability.

Universally, those commentators that referenced costs were concerned with the overall expense of keeping an animal in training. While none referenced the anticipated costs as being exorbitant, most reflected a concern of yet an additional expense, on top of the HISA expenses that have been recently imposed. Several Finger Lakes owners noted that any fees associated with the examination would necessarily impact them more significantly than NYRA owners given the purse differential. With respect to effectiveness, the comments were varied. Several raised concerns with three days being unrealistic given practical racing office administration. Others thought the three-day time period was inappropriate, given a horse could be medicated to pass its three-day examination, yet be clear enough to race. Others suggest that the experience of Churchill Downs was significant, in that they shut down the race meet due to fatalities despite having a rule similar to that proposed.

Availability of equine veterinarians was also a common theme, with virtually every comment raising concern, especially at Finger Lakes, with the availability of staff to undertake the proposed required certifications. Some commentators raised concern that newly licensed veterinarians may not have enough experience to make evaluations.

Overall, there were numerous suggestions that Commission staff are considering. Several commentators suggested that should the Commission go forward, phasing of implementation should be considered, with requiring post-entry examination be first required before pre-workout examinations be considered. Several commentators suggested that Finger Lakes is unique from NYRA, with a substantially reduced number of racing or training fatalities over time. Accordingly, there were suggestions that Finger Lakes be excluded from any rulemaking.

Many questioned the implementation methodology, suggesting that the process by which attending veterinarian examinations may be transmitted should be clearly established before such a rule is adopted. Several suggested that the methodology need be simple, to limit any potentially burdensome experience on an attending veterinarian. One commentator suggested that perhaps trainers need to negatively qualify for a heightened level of scrutiny, perhaps only following a catastrophic breakdown in their stable.

Numerous commentators suggested that the Commission revise the rule to require a pre-entry certification. This, they suggested, would be timelier to when the horse would be competing, and eliminate potentially masking medications.

Commission staff will continue to review the comments in context with the changing landscape and will conduct additional contacts with Finger Lakes and NYRA horsemen while a staff recommendation is developed.

**Chair O'Dwyer:** Now we go on to our regulations.

**Robert Williams:** For Commission consideration is the adoption of revised proposed rules to govern interactive fantasy sports. The Commission published a Notice of Proposed Rulemaking in the July 20, 2022, State Register and received public comment. Upon consideration of the public comments, the Commission published a Notice of Revised Rulemaking in the August 2, 2023, State Register. This rulemaking's public comment period expired on September 18, 2023.

Four comments were received, from the Coalition for Fantasy Sports, FanDuel, Mojo Interactive, Inc. and Vivid Seats, LLC. Additionally, 1,462 form letters solicited by Prize Picks, an IFS provider that wishes to operate in New York.

**Chair O'Dwyer:** The Commissioner have all received those comments and have read them,

**Robert Williams:** I do want to note that the commission continues to receive some comments and concerns regarding interactive fantasy sports well outside the public comment period and we're going to continue to review those, and should we determine any of them are appropriate we'll advance additional amendments in the future.

**Chair O'Dwyer:** So, I will take a motion so I will take a motion to take those and put them in the record as read.

**Commissioner Moschetti:** So moved. **Commissioner Moschetti:** Second

**Chair O'Dwyer:** They are received in our record as read. So I will take a motion so I will take a motion to take those and put them in the record as read. Mr. Williams has indicated um we've gone over the comments and the staff recommendations staff has recommended that we adopt these rules in regard to Fantasy Sports. Can I have a motion that we adopt these regulations.

**Chair O'Dwyer:** The motion carries.

**Robert Williams:** For Commission consideration is adoption of rules to regulate sports wagering advertising, marketing, and promotion. The Commission published a Notice of Proposed Rulemaking in the August 2, 2023, State Register meaning this rulemaking's public comment period expired on October 2, 2023.

The proposed rule would, among other things, firmly establish licensee responsibility for the content of their advertising, marketing and branding; prohibit false, deceptive or misleading statements; require marketing and promotions to clearly and conspicuously

disclose material facts, terms and conditions to potential customers; require an opt-out functionality to block receipt of future direct advertisements; prohibit designs aimed to appeal primarily to underage persons; prohibit advertising to a target audience that is reasonably foreseeable to comprise underage persons; and prohibit advertising on college and university media. Elements of the proposal are derived from the American Gaming Association's Responsible Marketing Code for Sports Wagering and from sports wagering advertising regulations from other states. Three public comments were received, from FanDuel, a licensed mobile sports wagering operator, iDevelopment and Economic Association, or iDEA, which is a trade association that that advocates on behalf of elements the online gaming industry, and the New York State Broadcasters Association.

New York State broadcasters Association which represents a variety of interests in broadcasting. The broadcasters made a few suggestions uh to clarify intent two proposals in fact that would that the staff believes are appropriate and have circulated that language to each of the members of the commission to accomplish that goal these potential additions if accepted by the commission would be non-substantive changes in the nature of clarifications that would be noted in the notice of adoption consistent with State Administrative Procedures Act section 202 5c Roman at 3 and not require a rule re-proposal. Staff recommends that the commission adopt this rulemaking with the proposed clarifying language as circulated.

**Chairman O'Dwyer:** First of all so let us take the fact that we have received the comments from FanDuel, iDea and New York State Broadcasting Association those are in our written materials and I would take a motion to accept those in the record and deemed that as read.

**Commissioner Crotty:** So moved.

**Chairman O'Dwyer:** Second? Commissioner Moschetti. All those in favor? Motion carries.

**Robert Williams:** The State Administrative Procedures Act provides that a rule may be filed as a consensus rule if no person is likely to object to its adoption, and the rule either repeals regulatory provisions which are no longer applicable to any person, implements nondiscretionary statutory standards or conforms a rule to these standards, or makes technical changes or is otherwise noncontroversial. In summary, the law permits outdated rules, rules which are required by law, technical rules, and unobjectionable rules to be filed as consensus rules.

On August 3, 2023, the Commission authorized a consensus rulemaking proposal regarding Claiming Rules Revisions in Thoroughbred Racing following significant consultation with industry stakeholders, including NYRA and Finger Lakes management, the New York Thoroughbred Horsemen's Association and the Finger

Lakes Horsemen's Benevolent and Protective Association. The consensus rulemaking proposal was published in the August 23, 2023, State Register.

The Commission received one public comment, from an Indiana-based horseman who disagreed with the proposal. The commentator suggested 30 days was plenty to require a claimed horse to not race outside New York State after a claim. The commentator further claimed the proposed rule would make it more difficult for horse ownership to be cost efficient.

This negative comment negates the consensus. Staff now recommends the Commission withdraw the previously proposed consensus rulemaking and propose the same as a standard rulemaking.

**Chairman O'Dwyer:** Any questions on the consensus withdrawal? May I have a motion to withdraw the consensus proposal?

**Commissioner Moschetti:** So moved.

**Chairman O'Dwyer:** I thought we should have a just a quick update casino license process.

**Robert Williams:** From a practical perspective the round two questions for the casino licensing process or for the RFA are due on October 5th the end of the October 5<sup>th</sup>, 6<sup>th</sup> at the end of the week this week uh we anticipate immediately going to start triaging those and hopefully we won't get 600 plus questions again this time the gaming facility location board members themselves have asked to conduct a meeting they want to consider the proposed rules that they had and they want to address some technical matters relative to timelines and some scope of some of the answers of the questions that we had had hesitated to provide clear direction on during the round one questions that meeting is anticipated to be conducted somewhere around the third or the fourth week of October. At the conclusion of the answers to the to the round two questions applicants will have 30 days to submit their response to the requests for applications.

**Chairman O'Dwyer:** I know that some of the Commissioners have asked that we meet in joint session to basically thank them for the work and get to know them better because ultimately they will have an important decision and we appreciate their work. I guess we're on to adjudications. Mr. Williams?

**Robert Williams:** On June 7, 2021, the Commission issued a Findings and Order revoking the license of thoroughbred trainer Linda Rice, fining her \$50,000, and prohibiting her from reapplying for licensure for a period of three years, upon finding that Rice repeatedly engaged in improper practices over a period of years by

soliciting and receiving access to nonpublic information about race entries, in violation of Commission Rule 4042.1(f).

Rice brought an Article 78 proceeding and declaratory judgment action to challenge the Commission's determination, claiming that the Commission's decision was not supported by substantial evidence and the Commission's improper-practices rule was unconstitutionally vague. She obtained a temporary restraining order from Supreme Court, Schenectady County, which then transferred the Article 78 substantial evidence issue to the Appellate Division, Third Department; denied Rice's claim for declaratory relief on the constitutional question; and continued the temporary restraining order pending the Appellate Division's determination.

The Appellate Division, Third Department, in a judgment dated June 8, 2023, held that the Commission's determination that the improper-practices rule had been violated was supported by substantial evidence, rejected Rice's constitutional claim, but overturned the penalty, concluding that a three-year revocation was disproportionate to the offense and so shockingly unfair as to constitute an abuse of discretion as a matter of law. The Appellate Division further concluded that a license revocation was entirely unwarranted and remitted the matter to the Commission to reassess the penalty.

The matter was returned to the Commission to reassess the penalty, with the constraint that any reassessed penalty cannot contain a license revocation.

Materials regarding the adjudication have been recirculated to each Commissioner, and, at the request of the Chairman, both Commission and Rice counsel were requested to update their post-hearing brief with respect to penalty recommendation. Both counsels did, and such material was circulated to each Commissioner.

The Commission considered this matter at a meeting conducted pursuant to the judicial or quasi-judicial proceedings exemption of N.Y. Public Officers Law § 108.1.

**Chairman O'Dwyer:** Today the commission acted on a remand from the Appellate Division Third Department concerning the trainer Linda Rice the Appellate division agreed with the commission's finding that trainer Rice had blatantly broke the rules of racing by conspiring with others to choose the optimal races for her horses. The Appellate division, however, determined that any revocation was unwarranted. We respectfully disagree with that decision but are constrained by law the following. The original fine of \$50,000 was predicated on a three-year revocation since that is now not extend we have decided on the basis of the record that was before us, and I might note that the entire record was before every commissioner including the briefs and the hearing below that we will increase the fine to \$100,000 and we

therefore impose a penalty on trainer Rice of \$100,000. The vote was unanimous in that regard.

The next item of the agenda is consideration of Fanatics ownership acquisition of Points Bet. Mr. Williams?

**Robert Williams:** Chapter 59 of the Laws of 2021 amended N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1367 and added § 1367-a to authorize mobile sports wagering when the sports wager is made through virtual or electronic means from a location within New York and is transmitted to and accepted by electronic equipment located at a Licensed Gaming Facility. The statute directed the Commission to conduct a competitive bidding process to award licenses to Mobile Sports Wagering Platform Providers. Pursuant to that authority, on July 9, 2021, Commission staff issued a Request For Applications or RFA to award a license to at least two Mobile Sports Wagering Platform Providers such that the result would be the hosting of no less than four Mobile Sports Wagering Operators.

In response to the bids received, an Evaluation Committee advanced for licensing award as a Platform Provider Sports Information Services Limited doing business as Kambi, with American Wagering, Inc. doing business as Caesars Sportsbook; Empire Resorts, Inc. doing business as Resorts World Bet; PointsBet New York LLC doing business as PointsBet; Rush Street Interactive NY, LLC doing business as Rush Street Interactive; and WSI US, LLC doing business as WynnBET as Platform Providers and/or Operators and Betfair Interactive US LLC doing business as FanDuel Sportsbook as an additional Platform Provider and Operator with Bally's Interactive, LLC doing business as Bally Bet; BetMGM, LLC; and DraftKings as Platform Providers and Operators.

Chapter 59 of the Laws of 2021 did not create a new licensing scheme for Mobile Sports Wagering. Rather, the RFA and proposed rules by the Commission identified Platform Providers and Operators to be licensed equivalent to Casino Vendor Enterprises. On November 2, 2021, the Commission met and accepted the licensure recommendations of the Evaluation Committee. Later that same meeting, the Commission adopted rules governing, among other things, various licensing requirements. Staff was left, consistent with practice, with evaluating and determining whether and when each Platform Providers and their Operators were qualified for the appropriate license.

A subsequent evaluation found all Platform Providers and their Operators suitable for conditional licensing and were accordingly licensed. As has been widely reported, Fanatics agreed to acquire PointsBet's U.S. assets. As background, FBG Enterprises Opco, LLC d/b/a Fanatics Betting and Gaming, a subsidiary of Fanatics Holdings, Inc. entered into an agreement to purchase PointsBet USA's subsidiary PointsBet New York LLC, a Platform Provider and Operator licensed in New York since January 24, 2022. The purchase agreement was signed on May 14, 2023, approved by the PointsBet Board of Directors on June 26, 2023, and finalized by the shareholders on June 29, 2023. PointsBet Holdings Limited is an Australian based iGaming and sports wagering

company founded in 2015, with operations in Australia, the United States, Canada and Ireland. This transaction only involves the U.S. subsidiary, which launched in January 2019.

Fanatics Holdings, Inc. operates as a holding company. Through subsidiaries, Fanatics Holdings operates as a manufacturer and online retailer of licensed sportswear, sports collectibles, trading cards, and sports merchandise, as well as sports betting and iGaming.

Practically, Fanatics has advised they will continue to use PointsBet's existing technology stack that has been deployed in New York. At present, that structure consists of a system firewall that passes a wager to the server housed in Resorts World Catskill. This server has redundant network infrastructure provided by two different internet providers and is continually self-tested with System and Organization Controls Type 2 threat hunting and distributed denial-of-service attack detection. Fanatics will continue to use Advanced Encryption Standard 256 Encryption for the communication to and from the server. Fanatics will also maintain use of the PointsBet mobile application.

Fanatics has committed to continuation of the current PointsBet internal controls, house rules, back-end reporting tools and Commission access, responsible gaming plan and the existing Know Your Customer vendors for customer confirmation. They will, however, utilize an outside entity to triage their customer service complaints, which is a different approach than that taken by PointsBet. This will ensure a seamless transition operationally and for customers who are currently wagering through the existing PointsBet platform.

Fanatics has advised they plan to holistically evaluate PointsBet operations and will seek incremental prospective changes as they determine prudent and appropriate.

From a licensing perspective, Commission standards for licensing require that each mobile sports wagering Platform Provider and Operator are licensed as a casino vendor enterprise using the standards found in N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1326 and Commission Rules Part 5303 and Part 5307.

Commission staff was notified of the anticipated PointsBet sale April 2023. Shortly thereafter, Fanatics submitted applications and documentation illustrating their ownership structure, organizational charts, and principal management employees. Commission staff reviewed the materials and subsequently identified which subsidiaries and individuals require a casino vendor enterprise or key license. In all, the Commission received required paperwork from Fanatics Holdings, Inc. and their subsidiaries. Additionally, nearly two dozen principal or key personnel license applications have been filed and reviewed.

All corporate and individual materials have been reviewed by the Licensing Bureau pursuant to the Licensing criteria standards of N.Y. Racing, Pari-Mutuel Wagering and

Breeding Law §§ 1323(2)(a) & 1323(2)(b), for informational deficiencies, criminal history, financial stability, and character and fitness. Additionally, all PointsBet staff being retained have filed the necessary paperwork to update their license status.

After substantive review of all licensing material, consistent with the review conducted for all initial platform providers and operators, Commission Licensing Bureau Staff have determined the submissions are full and complete and no disqualifying elements have been identified.

Division of Gaming staff have reviewed all operational components of the proposed Fanatics operation in a manner consistent with the review conducted for initial platform providers and operators, and have determined that they meet all standards necessary for operation.

Accordingly, Staff recommend approval of the transaction.

Should there be any questions, with us here today is the Manager of Licensing Krystie Phillips, Division of Gaming Director Tom Anapolis, and Deputy Directors Jim Googas. I would also like to recognize that we have some Fanatics Representatives here with us. My principal contact with Fanatics has been through Duane Morris's Frank DiGiacamo and I'd like Mr. DiGiacomo to introduce everyone.

**Mr. DiGiacomo:** Thank you Mr. Chairman and Commissioners. I am joined by my partner Adam Berger and Fanatics Ari Borod. Thank you.

**Chairman O'Dwyer:** Gentlemen and lady I have a couple of questions. First of all before we got to anything I want to thank our staff. I understand you have put Fanatics through the ringer and voluminous work done by all of you. ay um I have a question for Fanatics and let me just to have a concern actually in going over the materials I've noted um that one of your subsidiaries is Tops Trading cards. As you well know the commission has uh over the past year been very concerned about advertising and promotions to people that are underage. Obviously, the concern I have is the trading cards are meant in large part for people that are under the age allow to bet, in fact I have uh looking over the materials I see many superheroes from that I wouldn't know about but my children grandchildren certainly would. Can you give us an assurance that there would not be any sort of cross promotions between the trading cards and the sports betting.

**Ari Borod:** Beyond that question, so one of the I think in a lot of the materials you're providing um goal really Fanatics to deliver the best experience for sports. I think to do so as a responsible betting operator you have to abide by the rules that apply to avoiding marketing to minor. Paramount important to the industry both in New York and other states we currently do advertise on prior to doing that we did extensive research about the age demographic. One advantage we have in advertising to our own customers. We currently do not do any advertising for the

collectible business and we would do a similar amount of research to confirm that this is not direct. So to the extent for example trading cards with superheroes sold to children.

**Chairman O'Dwyer:** Let me just to follow up with that because obviously you those of us that have studied this know that the juxtaposition between Fanatics and Points Bet point is that you're involved in have a list of people that like sports and involved in sports buy your jerseys and whatever and I would assume at some point in time you may or decide to have a promotion on a cross promotion on a jersey versus a bet. I think that just makes sense to me I think the real problem I that I'm grappling with here that is unique to you as one of all of our licensees here is that there is a potentiality of you taking that portion of your business which is collectible or trading cards whatever form of and using them in a promotion who encourage sports betting which in my mind would be really impermissible. I think what I really need from you is a is a representation that will not occur.

**Ari Borod:** We can make that representation.

**Chairman O'Dwyer:** May I have a motion to approve the transaction?

**Commissioner Crotty:** So moved. **Moschetti:** Second.

**Chairman O'Dwyer:** Unanimous. Any further business before the commission on today's published agenda?

I'd like to make a couple of remarks before we adjourn on two items. You will recall that DraftKings, one of our licensees for sports betting on September 11th that used the tragedy of 9/11 to promote a parlay bet on New York sports teams. All of us were read this were called by the promotion and our staff issued a statement call and get reprehensible. In response I had the staff write to Draft Kings to ask for assurances that this type of behavior which was reprehensible would not be repeated. Of course good taste cannot be legislated or regulated, but I was concerned that there was not a valid filtering process in place especially given that regulations that we have established today. I am happy to report that I am meeting with our executive director on Friday with Matt Kalish the head of Draft Kings in Schenectady office at our office at his request so that we can establish a genuine dialogue to assure that this improper and disgusting advertising does not repeat itself.

And my second point last month um I directed our Horse Racing and Par Mutual wagering division who examine the matter of licensed trainers owing significant back pay to workers including hundreds of um thousands of dollars in h2b back wages. Most trainers in New York and workers and New York racetracks comply with the law, but we learned of trainers not paying workers we hold them

accountable. For example a trainer was recently ordered by the US Department of Labor to pay \$204,999 in back wages, fines and penalties. This is not the first time that this particular trainer and his stable have been ordered to pay back wages. Accordingly the commission requested the trainer to provide appropriate employment records as part of its review. The commission also requested the trainer to explain why he believes he continues to meet the New York State standards licensure. We have received that response and are receive and are reviewing that in terms of any potential future actions. In the future to properly identify any licenses engaging in bad labor practice we forged partnership with the New York State Department of Labor so the commission is notified when complaints regarding a trainer's business practices spur an investigation. This bridges the regulatory gap so that when we learn of trainers engaged in practices that shortchange their employees we can consider further action regarding the licenses this should be fair warning to all just as we expect our equine athletes to be treated with dignity and respect, so too we expect all who work in the industry to be treated similarly with dignity and respect. I want to thank the Department of Labor, the New York State Department of Labor commissioner Roberta Riordan for continuing to partner with us to protect the thousands of workers who take care of race horses. I can assure you Commissioners and the general public that this commission does not take those type of violations lightly.

That concludes the today's agenda and my remarks. Do any of the Commissioners have any remarks that they wish to say? The meeting is adjourned.

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