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INDIANA HORSE RACING COMMISSION

PUBLIC HEARING REGARDING

LEGISLATIVE SERVICES DOCUMENT #14-230,

A PROPOSED RULE REGARDING

VARIOUS ADMINISTRATIVE RULES

CONCERNING THE CONDUCT OF HORSE RACING

IN INDIANA

HELD ON OCTOBER 3, 2014

1 TERRY RICHWINE: It's October 3, 2014. It
2 is right now 1:38 p.m. We are in the downtown
3 Indianapolis office of the Indiana Horse Racing
4 Commission.

5 We are at a public hearing reference some
6 rules for the, from the Indiana Horse Racing
7 Commission.

8 At this time, I have with me Zack
9 Peters(phonetic) and Jim Hartman(phonetic).

10 My name is Terry Richwine, Director of
11 Investigations for the Race Commission.

12 And I will now turn this over to
13 Zack(phonetic).

14 ZACK PETERS: All right. My name is Zack
15 Peters(phonetic). I am a legal intern at the
16 Horse Racing Commission.

17 And the purpose of this hearing is to
18 receive public comments on Legislative Services
19 Document Number 14-230, a proposed rule regarding
20 various Administrative Rules concerning the
21 conduct of horse racing.

22 The proposed rule was posted by the *Indiana*
23 *Register* on September 10, 2014.

24 The Small Business Economic Impact Statement
25 was completed and filed with the OMB in the

1 Office of the Small Business Ombudsman. Copies
2 of the Small Business Ombudsman Statement are
3 available and are posted on the Commission's web
4 site.

5 The purpose of this hearing is solely to
6 receive comments regarding the proposed rule.

7 This hearing is not a question and answer
8 session, and participants are asked to keep their
9 comments restricted to the rules being adopted.

10 If there are any questions about the rules,
11 those questions should be directed to staff at
12 another time.

13 If you have a comment about the proposed
14 rule, but do not wish to speak, please make sure
15 to submit your comment in writing by the end of
16 the day.

17 For those of you who are speaking, please
18 make sure to speak clearly and state your name,
19 so that we can get it on record.

20 For the sake of giving everyone the
21 opportunity to speak, please limit your comments.
22 I don't think that's, we're going to have any
23 problems with that.

24 So, right now we're going to open it up for
25 comments. Like I said, take as long as you want,

1 and because we just --

2 JIM HARTMAN: Great, great. Jim Hartman,
3 H-A-R-T-M-A-N.

4 One of the things that I do want to comment
5 on regarding the Notice of Intent to, to Readopt
6 and, and this singular rule, which obviously has
7 multiple parts, is the actual Notice of Intent to
8 Readopt, which is listed as LSA Document 13-345.

9 Underneath the statutory authority, it lists
10 IC 4-31 and IC 4-35.

11 First of all, IC 4-35 has no rule-making
12 authority for any one of the rules being
13 considered today at this public hearing or that
14 will be put in front of the Commission.

15 The statutory authority of IC 4-31 is
16 actually an incorrect cite, as well.

17 The law requires that, and this is
18 IC 4-22-2-23(b), the publication notice must
19 include an overview of the intent and the scope
20 of the proposed rule, which I believe it does,
21 and the statutory authority for the rule.

22 Simply quoting the, the, the title and the
23 Article of IC 4-31 is not specific, as required
24 by the LSA, which the law requires that certain
25 aspects of drafting rules be considered.

1 And that includes readoption notices, which
2 state that the statutory authority and
3 authorities must be listed.

4 In every example that LSA provides in the
5 administrative drafting, Administrative Manual,
6 they go to the section, as in, for an example,
7 IC 8-23-2-6 is what's used on page 38 of that
8 particular manual.

9 So, the, the, the cite or, of statutory
10 authority on the notice to readopt is, is
11 actually incorrect. It's not specific.

12 To contrast that, recently the Indiana Horse
13 Racing Commission filed another Notice of Intent
14 to Readopt under LSA Document 14-378, which
15 spells out specifically, to the section, as to
16 the statutory authority for their rule-making.

17 And I would like to put all of that into the
18 document that you are creating here.

19 The Indiana Horse Racing Commission has
20 basically used what they believe to be unlimited
21 rule-making authority to create rule books that
22 in many ways are beyond the statutory authority
23 that they have been granted by their authorizing
24 statute.

25 They are, especially when considering due

1 process and disciplinary actions, which is the
2 majority of what is being considered for
3 readoption.

4 The law specifically requires the use of the
5 Administrative Orders and Procedures Act, which
6 is IC 4-21.5.

7 There are many references to the
8 Administrative Orders and Procedures Act in the
9 authorizing statute.

10 Yet the Indiana Horse Racing Commission has
11 created 71 IAC 10, which is labeled Due Process
12 and Disciplinary Action, that essentially is a
13 parallel system and in many ways circumvents the
14 Administrative Orders and Procedures Act.

15 In many of the Administrative Rules that are
16 being considered for readoption, the authority
17 line is listed as IC 4-31-39, which requires,
18 which allows for certain elements of
19 discretionary actions in rule-making by the
20 Indiana Horse Racing Commission.

21 For any other regulation that the Commission
22 determines in the public interest in the conduct
23 of recognized meetings and wagering on horse
24 racing in Indiana.

25 That's not an, an open invitation to create

1 rules that ultimately circumvent the
2 Administrative Orders and Procedures Act, or any
3 rule that the Commission deems to be necessary,
4 especially if they are not authorized to do so.

5 And I can give you a few examples. And I
6 think in the, taking time in consideration, I'll
7 give an example of the readoption of
8 71 IAC 1.5-1-50, Jurisdiction, and also
9 71 IAC 1-1-52, Definition of Jurisdiction.

10 These two administrative definitions extend
11 the authority of the Indiana Horse Racing
12 Commission beyond their statutory jurisdiction
13 granted by IC 4-31-1, Pari-mutuel Wagering on
14 Horse Racing.

15 Therefore, these two administrative
16 definitions should not be readopted as is, but
17 modified significantly to reflect the IHRC's
18 statutory authorizations, and more importantly,
19 limitations.

20 Both the Standardbred and Flat Racing Rule
21 Books have the same basic jurisdiction
22 definition, which is, which is defined as,
23 jurisdiction of the Commission means the State of
24 Indiana.

25 *Merriam-Webster* defines jurisdiction in a

1 number of ways. 1, the power, right or authority
2 to interpret and apply the law; 2a, the authority
3 of a sovereign power to govern or legislate; 2b,
4 the power or right to exercise authority,
5 control; 3, the limits or territory within a,
6 within which authority may be exercised.

7 With, with these definitions as a backdrop
8 to these Administrative Rules, the IHRC must
9 believe that their power, authority, control and
10 territory is the entire state.

11 Effectively, the IHRC is claiming that the
12 regulatory jurisdiction is the entire state of
13 Indiana.

14 Indiana statute disagrees in a number of
15 ways with the IHRC's position.

16 First, the idea that the IHRC has to create
17 such a definition of their jurisdiction in
18 Indiana Administrative Code is actually
19 laughable, because the whole idea of an
20 authorizing statute is to determine the limits of
21 an administrative authority -- agency's
22 authority.

23 The definitions chapter in Indiana law, and
24 that's IC 4-31-2, does not include a jurisdiction
25 definition, because the entirety of the law is

1 simply a definition of jurisdiction, in and of
2 itself.

3 Yet somehow the IHRC's current
4 interpretation of this authorizing statute leads
5 to such a definition as the state of Indiana.

6 Had the Indiana Legislature felt it was
7 necessary to specifically define the IHRC's
8 geographical jurisdiction, they would have.

9 Second, IC 4-31, which is Pari-mutuel
10 Wagering on Horse Racing, is not the only aspect
11 of Indiana law that addresses horse racing.

12 However, IC 4-31 is the only article that
13 gives the IHRC any authority over horse racing,
14 and more specifically, pari-mutuel horse racing.

15 The Indiana Legislature was very specific in
16 IC 4-31-1-1, which provides that the
17 applicability of the law does not apply to horse
18 racing meetings at which pari-mutuel wagering is
19 not permitted.

20 By that statutory pronouncement alone, the
21 application of the IHRC's jurisdiction cannot be
22 the entire state, and limits the IHRC's
23 authority.

24 By the wording of IC 4-31-1-1, the Indiana
25 Legislature defined the jurisdiction of the IHRC

1 to only horse racing meetings at which pari-mutuel
2 wagering is permitted, which doesn't place, take
3 place broadly across the entire state of Indiana,
4 only at race tracks during recognized meetings.

5 The Indiana Legislature, in IC 15-19-3,
6 Regulation of Horse Racing, grants no authority
7 to the IHRC over other types of horse racing or
8 locations within the state of Indiana.

9 The only exception would be the legislative
10 intent expressed in IC 4-31-5.5, which is
11 Satellite Facilities, which provides that the
12 IHRC's jurisdiction is actually only over
13 locations within the state that provide
14 pari-mutuel wagering on live horse racing, and
15 those off-track simulcasting locations that can
16 also provide pari-mutuel wagering on horse racing
17 on races in Indiana and around the country.

18 Therefore, by statute, the IHRC's
19 jurisdiction is defined as being only at Indiana
20 race tracks for recognized meetings, and at all
21 licensed OTB's, and not beyond.

22 Third, the authority line in current
23 versions of 71 IAC 1.5-1-50 and 71 IAC 1-1-52,
24 claim that IC 4-31-3-9, which is Powers, gives
25 the IHRC the authority to create, create a

1 jurisdiction definition that encompasses the
2 entire state.

3 According to Indiana statute, an
4 administrative agency is required to cite from
5 where they get their rule-making authority for
6 each Administrative Rule.

7 In reviewing IC 4-31-3-9, the only possible
8 portion of the statute that provides the IHRC
9 discretionary rule-making authority is
10 IC 4-31-3-9(a)-1(H), which states, any other
11 regulation that the Commission determines is in
12 the public interest in the conduct of race
13 meetings and wagering on horse racing in Indiana.

14 What the law actually allows for is
15 rule-making for recognized race meetings in
16 places where people can wager on horse racing,
17 which is a very limited definition, when compared
18 to the IHRC's entire state of Indiana claim.

19 Indiana statute only provides for the IHRC's
20 discretionary rule-making, and, therefore,
21 exercise of, of authority at two tracks and at
22 all licensed OTB's.

23 Fourth, regarding these, these two
24 Administrative Rules, statutory construction is
25 set, is a set of interpretation guidelines

1 established by the courts that apply to laws and
2 to Administrative Rules.

3 Statutory construction does not allow for
4 any interpretation of a law or Administrative
5 Rule that would lead to an absurd result.

6 Yet the IHRC's expanded definition of
7 jurisdiction as an entire state can lead to an
8 absurd result.

9 Indiana statute, through IC 4-31-13-1(a)-3
10 allows the IHRC to rule off a person from the
11 racetrack if, quote, if necessary in the public
12 interest to maintain proper control over
13 recognized meetings.

14 The IHRC expands upon this authority in the
15 Indiana Administrative Code under 71 IAC 2-10-1,
16 Exclusion of Patrons and Licensed and Unlicensed
17 Persons.

18 In this Administrative Rule, the IHRC
19 concludes that their authority allows for, quote,
20 exclusions under this section shall be for all
21 premises under the regulatory jurisdiction of the
22 Commission, including satellite facilities.

23 Given the current definition of jurisdiction
24 as the entire state, the IHRC's own
25 Administrative Rule gives them the ability to

1 exclude someone from their regulatory
2 jurisdiction, which again, is defined as the
3 entire state of Indiana.

4 This, of course, is absolutely absurd that
5 the IHRC can rule someone off and exclude them
6 from the entire state of Indiana.

7 So, I would like to submit that as written
8 input, as, as well.

9 I've got a, I've got a wide variety of
10 others. And I, I would imagine in the sake of
11 time, and you guys don't want me to sit here to
12 read through every single one of them.

13 So, how about if I just read into the
14 record, then, that I'm submitting written public
15 comments on some, some particulars and, and maybe
16 a few additional comments along the way.

17 I am also providing written comments for the
18 readoption of 71 IAC 1.5-1-45, Horse Defined, and
19 71 IAC 1-1-47, Horse Defined.

20 And, and just briefly on, on this one, there
21 is a line that suggests that horses have to be
22 registered for racing, yet the Commission doesn't
23 determine as to with whom they need to be
24 registered to race.

25 There is no statutory requirement or

1 Administrative Rule that would essentially cover
2 a registration for a horse to race.

3 Those probably should be indicated as the
4 Jockey Club Registration for Thoroughbreds; the,
5 the, the Trotting Association for Standardbreds;
6 and the quarter horse, the national -- I can't
7 remember the name of the national quarter horse
8 organization -- provides the registration. It's,
9 it's, it's lacking.

10 I also want to turn in public comments on
11 the readoption of the definition of maiden and
12 maiden race in the Flat Racing Book at
13 71 IAC 1.5-1-52 and 1.5-1-53.

14 In this particular one, there is an attempt
15 to incorporate by reference definitions from the
16 Breed Registry Rules, yet doesn't define what the
17 Breed Registry is, especially in the Flat Racing
18 Book that covers multiple breeds of thoroughbreds
19 and quarter horse.

20 The net result is that there are no
21 definitions of maiden race in any of the Breed
22 Registry requirements, specifically citing the
23 Jockey Club. So, that's definitely incomplete.

24 And it would be much better, instead of
25 defining a maiden race means, means a contest

1 restricted to maidens, to take the approach that
2 it means a contest restricted to non-winners.

3 Because maidens are described in the Jockey
4 Club Registry as those horses that have yet to be
5 bred, not anything related to racing. So, that,
6 that creates an absurdity, too.

7 I also want to provide public comments on
8 the readoption of substantial evidence
9 definitions in, in both of the, the rule books.

10 That's 71 IAC 1.5-1-100 and 71 IAC 1-1-105,
11 Substantial Evidence. The definition actually
12 uses the term reasoning mind to determine
13 substantial evidence.

14 The Supreme Court, actually, is the, the
15 organization that should define what substantial
16 evidence means, not the Indiana Horse Racing
17 Commission.

18 And, actually, in their definition, which
19 was from a case in 1938, it means such relevant
20 evidence as a reasonable mind might accept as
21 adequate to support a conclusion, not a reasoning
22 mind.

23 A reasoning, reasoning is actually a noun,
24 where an adjective needs to be added.

25 That's not, not something the, the Indiana

1 Horse Racing Commission should be considering for
2 readoption, and is actually incorrect if, if
3 readopted.

4 It's also incorrect in the fact that
5 IC 4-31-12-15(c) and IC 4-31-13-2(c) require a
6 standard of, of burden of proof as a
7 preponderance of evidence, which obviously is a
8 much higher standard than substantial evidence.

9 Public comments on the readoption of
10 71 IAC 2-7-1, Subpoenas.

11 Essentially, the IHRC has granted itself an
12 unfettered subpoena power with this particular
13 rule, instead of within the limitations of what's
14 required of them by law in IC 4-21.5,
15 Administrative Orders and Procedures Act.

16 So, I would like to enter that for your
17 record.

18 I'd also like to enter public comments
19 regarding the readoption of 71 IAC 2-8-1,
20 Records. And this is for public records
21 requests.

22 It's actually, this particular rule is an
23 unnecessary duplication of IC 5-14-3, Access to
24 Public Records, and, actually, adds requirements
25 that are not authorized by Indiana statute.

1 There is no statutory requirement in
2 IC 5-14-3 for a member of the public to submit
3 records requests, quote, to the Executive
4 Director on a form prescribed by the Commission.

5 There is no statutory requirement that a
6 person must pay all costs, or pay, even pay for
7 postage, which appears in the Indiana Horse
8 Racing rule.

9 This Administrative Rule should not be
10 readopted, as it is a duplication of statutory,
11 the statutory requirements already imposed on the
12 IHRC, and should be allowed to expire or be
13 repealed.

14 Public comments regarding the License
15 Refusal, and that is 71 IAC 5.5-1-12(sic), and
16 71 IAC 5.5-1-12, again, License Renewal.

17 This Administrative Rule, or these
18 Administrative Rules are in direct conflict with
19 IC 4-31-69, which states, the issuance, denial,
20 suspension or revocation of a license under this
21 chapter is subject to IC 4-21.5, which is the
22 Administrative Orders and Procedures Act.

23 Directly within the rule as being considered
24 for readoption, it basically says that a license
25 refusal, if the applicant contests a license

1 refusal, the Stewards or an Administrative Law
2 Judge, if the Stewards are unavailable, shall
3 conduct a hearing pursuant to procedures provided
4 for in 71 IAC 10.

5 Yet the law requires that the, the, any
6 issuance issue with the license be done
7 underneath the Administrative Orders and
8 Procedures Act.

9 And 71 IAC 10 is not the Administrative
10 Orders and Procedures Act.

11 I also want to provide public comments on
12 the readoption of 71 IAC 5.5-1-13, license
13 denial, which is in the same vein that
14 IAC 4-31-69 states, the issuance, denial,
15 suspension or revocation of a license under this
16 chapter is subject to IC 4-21.5, again, the
17 Administrative Orders and Procedures Act, and,
18 again, directly written into the rule.

19 It says, an Administrative Law Judge shall
20 conduct a hearing pursuant to the procedures
21 provided for in 71 IAC 10. Again, that should
22 read the Administrative Orders and Procedures
23 Act.

24 I would like to add public comments on the
25 readoption of 71 IAC 8.5-2-3, Selection of Horses

1 to be Tested, and 71 IAC 8-3-3, Selection of
2 Horses to be Tested.

3 These Administrative Rules actually are an
4 unnecessary duplication of IC 4-31-12-5, Blood
5 and Urine Tests.

6 In these particular rules, there is an
7 authorization of a, quote, designee of the
8 official veterinarian to authorize the taking of
9 samples, where no such authorization exists in
10 IC 4-31-12-5.

11 It's, it's pretty clear that the law doesn't
12 allow for that type of designation, yet the
13 Indiana Horse Racing Commission has allowed that
14 to occur within the Administrative Code. I'd
15 like to add that, as well.

16 Public comments regarding the 71 IAC 5-1-10,
17 Workers Compensation.

18 The authority line for this particular rule
19 establishes IC 4-31-6-2 as the authorizing
20 statute for this particular rule.

21 Yet that aspect of the Indiana statute only
22 allows for procedures for license applications
23 and for license fees.

24 There is rule-making capability given there,
25 but there is no explicit to add anything related

1 to workers compensation.

2 In fact, this particular rule is an
3 unnecessary duplication, as required by
4 IC 4-22-2-19.5(a)-3 of what is required of an
5 employer by IC 22-3, Workers Compensation System.

6 In a sense, too, this Administrative Rule
7 incorporates by reference IC 22-3, without fully
8 describing, fully and exactly describing, what a,
9 what a horseman is supposed to follow.

10 And in a sense, this doesn't have practical
11 enforcement, which is required under Indiana law,
12 because workers compensation laws are the
13 responsibility of the Workers Compensation Board.

14 And the IHRC has no authority to enforce
15 workers compensation laws.

16 And I understand as part of this public
17 hearing, there is also an addition of a workers
18 compensation definition inside the -- as opposed
19 to being readopted, a brand new rule to replace
20 one that had expired.

21 So, public comments on the adoption of
22 71 IAC 5.5-1-10.1, Workers Compensation, is
23 actually similar.

24 The authorization in the statute for
25 rule-making or for procedures for license

1 applications and license fees -- this, this isn't
2 either.

3 The Workers Compensation Board has oversight
4 and authority to create rules, not the Indiana
5 Horse Racing Commission. And the rule attempts
6 to incorporate those statutes without fully
7 describing exactly what those statutes are.

8 So, that needs a little work or should not
9 be readopted at all.

10 The last piece I had for commentary is, is
11 quite long. I won't bore you guys with the, the,
12 the read-through.

13 But it's regarding the readoption of
14 71 IAC 5.5-1-6, Consent to Search and Seizure,
15 and 71 IAC 5-1-6, Consent to Search and Seizure.

16 Essentially what these two rules have given,
17 is the Indiana Horse Racing Commission an
18 unlimited authority to search and seize any time,
19 anywhere, from anyone, whether licensed or
20 unlicensed.

21 The word seizure doesn't appear in Indiana
22 statute where there is authorization for, for
23 searches.

24 The, our, my view on this is, this is well
25 beyond the authorizing statutes of IC 4-31. They

1 are also well beyond the Fourth Amendment of the
2 U.S. Constitution.

3 The bounds of this particular document goes
4 through and, and evaluates this rule against what
5 is a known exception to the Fourth Amendment for
6 administrative searches.

7 Generally speaking, anybody that applies for
8 a license shouldn't, shouldn't believe that they
9 have a right to privacy when they are on the
10 grounds of a racetrack in, in, in any way.

11 The, the, the courts have, have definitely
12 ruled in, in, in that particular direction, as,
13 as an administrative agency like the Indiana
14 Horse Racing Commission furthers its regulatory
15 scheme.

16 However, the, the way in which this rule is,
17 these rules are written, there is an exception
18 for warrantless searches to the Fourth Amendment
19 for an administrative agency.

20 And there are standards that should be
21 applied towards the consent to search and
22 seizure.

23 Very clearly, the, the development of an
24 administrative scheme that's in the best interest
25 of horse racing and pari-mutuel horse racing that,

1 that there be the ability to search, and, and
2 even potentially seize, when, when people are on
3 sites.

4 But this, this rule is written so broadly
5 that it fails miserably with, with two other
6 standards that courts have applied to allow for
7 warrantless administrative searches.

8 And the balance of this document goes
9 through that and gives examples of what a person
10 is actually forced to sign with their licensing
11 applications, versus what is similar wording for
12 the Association of Racing Commissioners
13 International, which require that a person not,
14 or that, that an administrative agency has to
15 follow local and, and federal laws.

16 We would say that this, this particular
17 aspect of, of the Indiana Administrative Code
18 fails to do that to meet any particular
19 exception, and definitely needs to be reworked
20 within those recognized exceptions before it be
21 readopted.

22 And I believe that concludes the, the
23 comments that I have on this particular rule.

24 ZACK PETERS: Okay. So, yeah, now the, the
25 comments are finished. Say it's 2:06, and the

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hearing is adjourned.

(End of Public Hearing.)

(End of Recording.) *(