STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORTH FLORIDA HORSEMEN'S
ASSOCIATION, INC.,

Petitioner,

vs. Case No. 15-4359RP

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL
WAGERING,

Respondent,

and

FLORIDA QUARTER HORSE RACING
ASSOCIATION, INC.,

Intervenor.
_____/

FINAL ORDER

A final hearing was conducted in this case on December 17, 2015, in Tallahassee, Florida, before E. Gary Early, an administrative law judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues for disposition in this case are whether proposed rules 61D-2.024(5); 61D-2.025(1), (2), (4), (7), and (8)(a); 61D- 2.028(2)(a)-(d), (6), (7), and (8); and 61D-2.029 are invalid exercises of delegated legislative authority as defined in section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On July 30, 2015, Petitioner, North Florida Horsemen's Association, Inc. (Petitioner or NFHA), filed a Petition to Determine Invalidity of Proposed Rules. On August 24, 2015, Petitioner filed an Unopposed Motion for Leave to File Amended Petition. Petitioner's Unopposed Motion was granted on August 26, 2014.

On September 18, 2015, the Florida Quarter Horse Racing Association, Inc. (Intervenor or FQHRA), filed a Motion to Intervene. The Motion to Intervene was granted on September 22, 2015.

The case was scheduled to be heard on December 17 and 18, 2015. On December 8, 2015, the parties filed a Joint Motion for Oral Argument In Lieu of Evidentiary Hearing and Joint Prehearing Stipulation, by which the parties agreed that disputed issues of fact no longer existed in the case and that only legal issues remained to be litigated. Accordingly, the parties advised that an evidentiary hearing was no longer necessary and requested that the final hearing be limited to oral argument on the legal issues framed by the parties' joint prehearing stipulation.

In the Joint Prehearing Stipulation, the parties identified the Stipulated Facts, Stipulated Exhibits, and legal issues remaining in the case. The legal issues remaining were identified as: (i) whether proposed rules 61D-2.024(5); 61D-2.025(1), (2), (4), (7), and (8)(a); 61D-2.028(2)(a)-(d), (6), (7), and (8); and 61D-2.029 exceed the agency's grant of rulemaking authority in violation of section 120.52(8)(b); (ii) whether proposed rules 61D-2.024(5); 61D-2.025(1), (2), (4), (7), and (8)(a); 61D-2.028(2)(a)-(d), (6), (7), and (8); and 61D-2.029 enlarge, modify, or contravene the specific provisions of law implemented in violation of section 120.52(8)(c); (iii) whether proposed rules 61D-2.024(5); 61D-2.025(1), (2), (4), (7), and (8)(a); 61D-2.028(2)(a)-(d), (6), (7), and (8); and 61D-2.029 violate the "flush left" language in section

120.52(8); and (iv) whether proposed rules 61D-2.028(2)(a)-(d), (6), (7), and (8); and 61D-2.029 are vague in violation of section 120.52(8)(d).

The Joint Motion for Oral Argument In Lieu of Evidentiary Hearing was granted on December 8, 2015. The final hearing was held on December 17, 2015. At the final hearing, the parties presented legal argument. The parties did not order a transcript. At the close of the final hearing, the ALJ directed that PFOs be filed by January 12, 2016, to address the legal issues identified in the joint prehearing stipulation or the stipulated record.

The stipulated facts have been accepted and considered in the preparation of this Final Order.

Petitioner has requested an award of attorney's fees pursuant to section 120.595(2), Florida Statutes.

References to statutes are to Florida Statutes (2015), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the horsemen's association that represents the majority of the quarter horse owners and trainers at Gretna Racing, LLC ("Gretna Racing"). Gretna Racing holds a pari-mutuel permit and annual operating license that authorizes Gretna Racing to conduct pari-mutuel wagering on quarter horse races pursuant to chapter 550, Florida Statutes. The Horsemen's

Agreement between Petitioner and Gretna Racing has been filed with the Division in accordance with sections 550.002(11) and 849.086(13)(d)3. As the organization representing the majority of the horsemen participating in horse racing events conducted at Gretna Racing, NFHA is the statutorily-entitled recipient to the purses paid for the performances at Gretna Racing.

2. Petitioner has approximately 200 members, the majority of whom are owners, trainers, and jockeys of American Quarter Horses and other breeds that are authorized to participate in pari-mutuel quarter horse races. The Division has issued occupational licenses to the majority of Petitioner's members.

3. Respondent, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Respondent or Division), is the state agency charged with regulating pari-mutuel wagering activities in Florida pursuant to chapter 550.

4. Intervenor is tasked by statute with certain functions concerning the conduct and promotion of pari-mutuel quarter horse racing at racetracks throughout Florida. Intervenor is the Florida affiliate of the American Quarter Horse Association (AQHA), which is the national quarter horse membership organization responsible for maintaining uniform standards for American quarter horse racing worldwide.

5. NFHA's members engage in non-traditional quarter horse racing, including "barrel match" and "flag drop" racing. Barrel

match racing involves two adjacent rectangular tracks on which the horses and riders complete a cloverleaf pattern around preset barrels. Flag drop racing involves two or more horses racing simultaneously on a common, straight course of approximately 100 yards in length that is started by a flag drop, rather than a starting box or gate. Gretna Racing's existing track configuration supports these forms of quarter horse racing. NFHA's members and their horses are specifically trained for barrel match and flag drop racing and most would require extensive additional training to participate in other racing formats.

6. Barrel match racing and flag drop racing, as they have been conducted at Gretna Racing, will not be capable of being run on quarter horse tracks that meet the standards to be adopted by proposed rules 61D-2.024 and 61D-2.025. Many of Petitioner's members will not meet the jockey requirements to be adopted by proposed rule 61D-2.028 without additional training, and would be required to purchase racing uniforms under the proposed rule.

7. On October 19, 2011, the Division issued an annual operating license to Gretna Racing, which authorized it to conduct racing performances under its previously-issued quarter horse racing permit during the 2011/2012 season. For reasons best explained by Administrative Law Judge John Van Laningham in

Florida Quarter Horse Racing Association, Inc. v. Department of Business & Professional Regulation, Case No. 11-5796RU (Fla. DOAH May 6, 2013), the annual operating license had the effect of approving the conduct of barrel races at Gretna Racing.

8. Following the Division's issuance of the annual operating license to Gretna Racing, FQHRA challenged the Division's approval of pari-mutuel barrel match racing as an unadopted rule. After an evidentiary hearing, a Final Order was issued on May 6, 2013, determining that "the policy of the Division pursuant to which "Gretna-style" barrel match racing is treated as the legal equivalent of traditional quarter horse racing, so that a quarter horse racing permitholder is able to obtain an annual license authorizing pari-mutuel wagering operations on barrel match racing, is an unadopted rule which violates section 120.54(1)(a), Florida Statutes." Florida Quarter Horse Racing Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., DOAH Case No. 11-5796RU at 78.

9. The Final Order was affirmed by the First District Court of Appeal, quoting Judge Van Laningham with approval, that:

> To be legal and enforceable, a policy which operates as law must be formally adopted in public, through the transparent process of the rulemaking procedure set forth in section 120.54. In sum, the Division's policy of licensing the conduct of pari-mutuel wagering on [barrel match racing], on

> the ground that [barrel match racing] is legally equivalent to quarter horse racing, constitutes an unadopted rule. As such, it violates section 120.54(1)(a).

Fla. Quarter Horse Track Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., 133 So. 3d 1118, 1119-1120 (Fla. 1st DCA 2014).

10. Following the entry of that Final Order, NFHA entered into a Consent Order with the Division that allows match races started by a flag drop as a pari-mutuel event pending the adoption of rules establishing standards for quarter horse racing.

11. As a result of the Final Order, the Division began its rule development process for the proposed rules at issue in this proceeding when a Notice of Development of Rulemaking was published on September 6, 2013, in Volume 39, Number 174 of the Florida Administrative Register. A rule development workshop was held on October 16, 2013, in Fort Lauderdale, Florida. A second Notice of Development of Rulemaking was published on August 6, 2014, in Volume 40, Number 152 of the Florida Administrative Register. Another rule development workshop was held on August 27, 2014, in Orlando, Florida. The Division published a third Notice of Development of Rulemaking on December 24, 2014, in Volume 40, Number 248 of the Florida Administrative Register. A final rule development workshop was held on January 14, 2015, in Tallahassee, Florida.

Representatives of numerous entities, including NFHA and FQHRA, participated in the workshops.

12. On June 30, 2015, the Division published Notice of Proposed Rules 61D-2.024 through 61D-2.029 in Volume 41, Number 126 of the Florida Administrative Register. A public hearing was held on July 20, 2015, where representatives of numerous interested entities spoke and submitted written comments.

13. On July 28, 2015, the Division published a Notice of Change to the proposed rules in Volume 41, Number 145 of the Florida Administrative Register.

14. NFHA filed a petition challenging several of the proposed rules on July 30, 2015. On August 21, 2015, NFHA filed an Amended Petition to Determine Invalidity of Proposed Rules, which was accepted by the ALJ.

15. FQHRA filed a Motion to Intervene in the case on September 18, 2015. That motion was granted on September 22, 2015.

16. NFHA's Amended Petition challenged the following rules proposed by the Division: 61D-2.024(5); 61D-2.025(1), (2), (4), (7) and (8)(a); 61D-2.028(2)(a)-(d), (6), (7), and (8); and 61D-2.029.

17. The challenged rules purport to implement provisions of chapter 550, which governs pari-mutuel wagering.

18. NFHA contends that the challenged rules are an invalid exercise of the Division's delegated legislative authority because, in violation of section 120.52(8)(b), the Division is exceeding its grant of rulemaking authority in adopting the rules and, in violation of section 120.52(8)(c), the challenged rules enlarge, modify, or contravene the law implemented. NFHA further contends that each of the challenged rules violates the "flush left" language in section 120.52(8). Finally, NFHA asserts that proposed rules 61D-2.028(2)(a)-(d), (6), (7), and (8); and 61D-2.029 are vague in violation of section 120.52(8)(d).

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

20. Section 120.56(1)(a) provides that "any person substantially affected by . . . a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."

Standing

21. The parties have stipulated that all parties have standing to participate in this proceeding. If allowed to become effective, NFHA and FQHRA and their respective members

would be governed by the proposed rules and therefore each is substantially affected in a manner and degree sufficient to confer administrative standing in this case. See, e.g., Abbott Labs. v. Mylan Pharms., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n, 612 So. 2d 646, 651 (Fla. 1st DCA 1993); see also Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404, 407 (Fla. 1st DCA 1997)(recognizing that "a less demanding standard applies in a rule challenge proceeding than in an action at law, and that the standard differs from the 'substantial interest' standard of a licensure proceeding.").

22. Associations have standing to bring a rule challenge when:

> a substantial number of [the association's] members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be the type appropriate for a trade association to receive on behalf of its members.

Florida Home Builders Assn' v. Dep't of Labor and Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982); see also NAACP, Inc. v. Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003).

23. Although the parties have stipulated to Petitioner's and Intervenor's standing, it is concluded that, based on the stipulated facts and the affidavits filed by representatives of

each, that Petitioner and Intervenor, NFHA and FQHRA, meet the standards for associational standing.

Burden of Proof

24. In a challenge to a proposed agency rule, the petitioner has the burden of "going forward," and the agency then has the burden of proving by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat. Petitioner met its burden of "going forward" in this case.

25. When a substantially affected person seeks a determination of the invalidity of a proposed rule pursuant to section 120.56(2), the proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

Rulemaking Standards

26. Section 120.52(8) defines an "invalid exercise of delegated legislative authority." By stipulation of the parties, only sections 120.52(8)(b), (8)(c), and (8)(d), and the "flush left" paragraph at the end of subsection (8), are at issue in this proceeding. Those provisions establish that a rule is an invalid exercise of delegated legislative authority under the following circumstances:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and

> duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

27. The extensively cited cases of Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000), and Board of Trustees of the

Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001), recognize that the flush-left paragraph of section 120.52(8) was intended to restrict and narrow the scope of agency rulemaking. As established in Day Cruise:

> It is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class or powers or duties the Legislature has conferred on the agency.

794 So. 2d at 700. Nonetheless, "[i]t follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d at 600.

28. The Division's interpretation of chapter 550, a statute it is charged with administering, is entitled to "great deference unless there is clear error or conflict with the intent of the statute." Lakeland Reg'l Med. Ctr., Inc. v. Ag. for Health Care Admin., 917 So. 2d 1024, 1029 (Fla. 1st DCA 2006); see also Level 3 Commc'ns, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003); Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906,

908 (Fla. 2002); Fla. Hosp. (Adventist Health) v. Ag. for Health Care Admin., 823 So. 2d 844, 847 (Fla. 1st DCA 2002). The basis for such deference has been described as follows:

> Agencies generally have more expertise in a specific area they are charged with overseeing. Thus, in deferring to an agency's interpretation, courts benefit from the agency's technical and/or practical experience in its field.

Rizov v. Bd. of Prof'l Eng'rs, 979 So. 2d 979 (Fla. 3d DCA 2008), see also Avatar Dev. Corp. v. State, 723 So. 2d 199, 207 (Fla. 1998) ("Under the complexities of our modern system of government, the Legislature has recognized that [the Department of Environmental Protection], as a specialized administrative body, is in the best position to establish appropriate standards and conditions . . . .").

29. "[I]t is well established that the legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers." Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg. v. Fla. Horse Council, Inc., 464 So. 2d 128, 130 (Fla. 1985). Thus, the authority of the legislature to empower the Division to adopt pari-mutuel rules to establish standards for "holding, conducting, and operating of all racetracks, race meets, and races held in this state" is recognized by the undersigned.

Statutory Authority for the Proposed Rules

30. Among the statutory provisions cited by the division as authority for some or all of its rules are sections 550.2415, 550.235, and 550.0425. Those sections, both by stipulation of the parties and by review thereof by the undersigned, are determined to provide no authority for the challenged provisions of the proposed rules, and are not implemented by the challenged provisions of the proposed rules. Therefore, they do not merit further discussion.

31. By consensus of the parties, section 550.0251(3), entitled "[t]he powers and duties of the Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation," provides the primary rulemaking authority and law implemented for each of the challenged rules. That section provides that:

> The division shall administer this chapter and regulate the pari-mutuel industry under this chapter and the rules adopted pursuant thereto, and:
>
> * * *
>
> (3) The division shall adopt reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state. Such rules must be uniform in their application and effect, and the duty of exercising this control and power is made mandatory upon the division.

32. In addition to the foregoing, section 550.105, entitled "[o]ccupational licenses of racetrack employees; fees; denial, suspension, and revocation of license; penalties and fines," is cited as the law implemented by proposed rule 61D-2.028, Jockey Requirements, with sections 550.105(3) and (10)(a) cited as the rulemaking authority. Having reviewed the statute in its entirety, the undersigned concludes that those sections of the statute that could in any way be construed as being implemented by the proposed rules are the following:

> (1) Each person connected with a racetrack or jai alai fronton, as specified in paragraph (2)(a), shall purchase from the division an occupational license. All moneys collected pursuant to this section each fiscal year shall be deposited into the Pari-mutuel Wagering Trust Fund. Pursuant to the rules adopted by the division, an occupational license may be valid for a period of up to 3 years for a fee that does not exceed the full occupational license fee for each of the years for which the license is purchased. The occupational license shall be valid during its specified term at any pari-mutuel facility.
>
> (2)(a) The following licenses shall be issued to persons or entities with access to the backside, racing animals, jai alai players' room, jockeys' room, drivers' room, totalisator room, the mutuels, or money room, or to persons who, by virtue of the position they hold, might be granted access to these areas or to any other person or entity in one of the following categories and with fees not to exceed the following amounts for any 12-month period:
>
> * * *

2. Professional occupational licenses: professional persons with access to the backside of a racetrack or players' quarters in jai alai such as . . . jockeys and apprentices, . . . who might have access to the jockeys' room, the drivers' room, the backside, racing animals, kennel compound, or managers or supervisors requiring access to mutuels machines, the money room, or totalisator equipment: $40.

* * *

The individuals and entities that are licensed under this paragraph require heightened state scrutiny, including the submission by the individual licensees or persons associated with the entities described in this chapter of fingerprints for a Federal Bureau of Investigation criminal records check.

(b) The division shall adopt rules pertaining to pari-mutuel occupational licenses, licensing periods, and renewal cycles.

(3) Certified public accountants and attorneys licensed to practice in this state shall not be required to hold an occupational license under this section while providing accounting or legal services to a permitholder if the certified public accountant's or attorney's primary place of employment is not on the permitholder premises.

* * *

(10)(a) Upon application for an occupational license, the division may require the applicant's full legal name; any nickname, alias, or maiden name for the applicant; name of the applicant's spouse; the applicant's date of birth, residence address, mailing address, residence address and business phone number, and social

> security number; disclosure of any felony or any conviction involving bookmaking, illegal gambling, or cruelty to animals; disclosure of any past or present enforcement or actions by any racing or gaming agency against the applicant; and any information the division determines is necessary to establish the identity of the applicant or to establish that the applicant is of good moral character. Fingerprints shall be taken in a manner approved by the division and then shall be submitted to the Federal Bureau of Investigation, or to the association of state officials regulating pari-mutuel wagering pursuant to the Federal Pari-mutuel Licensing Simplification Act of 1988. The cost of processing fingerprints shall be borne by the applicant and paid to the association of state officials regulating pari-mutuel wagering from the trust fund to which the processing fees are deposited. The division, by rule, may require additional information from licensees which is reasonably necessary to regulate the industry. The division may, by rule, exempt certain occupations or groups of persons from the fingerprinting requirements.

The "Track" Rules - Proposed Rule 61D-2.024(5) and Proposed Rule 61D-025(1), (2), (4), (7) and (8)(a)

33. Petitioner has challenged proposed rule 61D-2.024(5), which provides that:

> A race course shall not require the racing animal to change its course in response to any obstacles on the racing surface during the race.

34. Petitioner has challenged proposed rules 61D-025(1), (2), (4), (7) and (8)(a), which provide that:

> (1) Each race must have at least five entrants with a minimum of two contestants.

(2) Each race, with the exception of a harness race and a steeplechase race, must start by use of a box or gate.

* * *

(4) Each quarter horse or any statutorily authorized substitute breed race other than thoroughbred conducted under a quarter horse permit:

a. Must be conducted on a track that is at least 50 feet in width; and

b. Must not be shorter than 330 feet in length.

* * *

(7) For each race, all racing contestants must compete simultaneously on a common track with a common start and finish line.

(8) Horse races must be recorded by at least three video cameras if the race includes turns or two video cameras if the race is on a straight track.

(a) Cameras must be located to provide clear panoramic and head-on views of each race. Separate monitors, which simultaneously display the images received from each camera and are capable of simultaneously displaying a synchronized view of the recordings of each race for review, shall be provided in the stewards' stand.

35. The rulemaking authority for both rules is cited as sections 550.0251(3) and 550.2415(12). The law implemented by proposed rule 61D-2.024 is cited as sections 550.0251 and 550.2415. The law implemented by proposed rule 61D-2.025 is cited as sections 550.235, 550.0251, and 550.2415. As set forth

above, the relevant authority for the challenged provisions of the proposed rules is limited to section 550.0251.

36. Petitioner cites to Department of Business & Professional Regulation v. Calder, 724 So. 2d 100 (Fla. 1st DCA 1998), as authority for its argument that the Division lacks specific rulemaking authority for the proposed rules. The court's opinion in Calder must be read in light of the proposed rules at issue, which authorized warrantless searches of persons and places within a permitted pari-mutuel wagering facility. In that case, the Court correctly determined that

> It is clear, however, that the statutory provisions fail to convey the requisite power to the agency to conduct searches. Subsection 550.0251(3) merely empowers the Division to "adopt reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state." This general grant of rulemaking authority, while necessary, is not sufficient to validate rule 61D-2.002 under the 1996 amendment to section 120.52(8). A specific law to be implemented was also required, and nothing in this subsection identifies the power that the rule attempts to implement, *i.e.*, to search.

Dept. of Bus. & Prof'l Reg. v. Calder, 724 So. 2d at 102.

37. In further explaining its opinion, and the extent to which Constitutional liberties may have played a role, the Calder court concluded by ruling that:

> In St. Johns we interpreted the above language to mean that the rule or proposed rule could be considered "a valid exercise of delegated legislative authority [only] if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented." 1998 Fla. App. LEXIS 9592, *22-23 (emphasis added). Obviously, there is nothing in the class of powers and duties identified in section 550.0251 that delegates to the Division the right to search persons or places within pari-mutuel wagering facilities, or any provision in the statute deeming a licensee of same to have waived the protections of the Fourth Amendment by consenting to such searches.

Id. at 105-106.

38. Unlike the warrantless search rules at issue in Calder, the second clause of section 550.0251(3) provides a grant of authority specifically tailored to the adoption of standards for racetracks, race meets, and races. Section 550.0251(3) further provides an expression of the scope of the legislative grant of authority, providing that "[s]uch rules must be uniform in their application and effect, and the duty of exercising this control and power is made mandatory upon the division."

39. The challenged sections of proposed rules 61D-2.024 and 61D-2.025, establishing racetrack and race standards, do not enlarge, modify, or contravene the Division's "mandatory" authority to adopt rules for "holding, conducting, and operating of all racetracks, race meets, and races held in this state."

40. The second clause of section 550.0251(3), combined with the legislative mandate of exercising that rulemaking power and control, establishes the "specific powers and duties" to be implemented and interpreted by the Division.

41. As with Calder, the restriction on agency rulemaking as described in Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, supra, should be read in light of the fact that the proposed rule in that case had, essentially, no support in the rulemaking authority of the Trustees. The Day Cruise opinion took into account the nature of the proposed rule at issue as establishing "a selective prohibition based not on the use vessels make of sovereignty lands but on the use to which certain vessels are put once they have steamed offshore." Id. at 697-698. The court recognized that the Legislature limited "the Trustees' submerged lands rulemaking authority to rules governing physical changes to or other effects on sovereignty lands and proximate waters and provides that any such rules the Trustees may adopt 'must not interfere with commerce or the transitory operation of vessels through navigable water.'" Id. at 702. Thus, the agency's effort to restrict offshore gambling by restricting otherwise lawful mooring under the standards applicable to the use of sovereignty lands exceeded the Trustees' grant of rulemaking authority. With regard to section 120.52(8)(c), the court

concluded that "[t]he provisions purportedly to be implemented here are completely silent about day cruises and about gambling, and confer no authority to bar day cruise vessels--or any other vessels--from sovereignty submerged lands based on lawful activities occurring outside Florida's territorial jurisdiction."

42. Contrary to the situation confronted by the court in Day Cruise, the Legislature in this case empowered the Division to adopt rules establishing standards for racetracks, race meets, and races, under a specific statute authorizing the same, and furthermore made the duty of exercising that power mandatory on the Division. Thus, the proposed "track" rules "implement[] or interpret[] specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency." Bd. of Trs. of the Int. Imp. Trust Fund v. Day Cruise Ass'n, 794 So. 2d at 700.

43. The sufficiency of the rulemaking authority in this case, and the validity of the challenged rules regarding racetracks, race meets, and races, also finds support in United Faculty of Florida v. Florida State Board of Educators, 157 So. 3d 514 (Fla. 1st DCA 2015), in which the court held that:

> it is not necessary under Save the Manatee Club and its progeny for the statutes to delineate every aspect of tenure that the

> Board is authorized to address by rule; instead, all that is necessary is for the statutes to specifically authorize the Board to adopt rules for college faculty contracts and tenure, which the statutes clearly do.

Id. at 517-518.

44. Without the ability to set track and race standards, the legislative authority in section 550.0251(3) would have little purpose or meaning. Thus, with regard to proposed rules 61D-2.024 and 61-2.025, the undersigned concludes, as did the court in United Faculty of Fla., that "the Legislature has clearly delegated the agency authority to adopt rules on the issue and the agency complie[d] with the rulemaking process. Of course, if the Legislature believes that the new standards and criteria for [holding, conducting, and operating of all racetracks, race meets, and races] that are embodied in the challenged rule are too onerous or do not comport with its intent, it is free to legislate accordingly." Id. at 519.

The "Jockey" Rules - Proposed Rule 61D-2.028(2)(a)-(d), (6), (7), and (8)

45. Petitioner has challenged proposed rules 61D-2.028(2)(a)-(d), (6), (7), and (8), which provide that:

> (2) The horserace permitholder shall maintain documentation confirming all jockeys allowed to ride at its race track have demonstrated riding ability. The demonstration of riding ability is defined at a minimum as:

a. Breaking with a horse in company from the starting gate;

b. Working a horse in company around the turn and down the stretch;

c. Switching the riding crop from one hand to the other while maintaining control of the horse in a stretch drive; and

d. Causing a horse to switch leads coming out of the turn.

* * *

(6) During the conduct of a pari-mutuel race, each jockey shall wear white pants and unique racing colors registered with the horserace permitholder.

(7) The racing colors to be worn by each jockey in a race shall be described in the program, and any temporary substitution of racing colors shall be announced prior to the start of the race.

(8) Jockeys and exercise riders must wear a properly secured protective helmet, vest, and boots which have been specifically designed for horse racing when riding in races or when exercising horses.

46. Rulemaking authority for proposed rule 61D-2.028 is cited as sections 550.0251(3), 550.105(3) and(10)(a), and 550.2415(12). The law implemented by proposed rule 61D-2.028 is cited as sections 550.0251, 550.0425, 550.105, and 550.2415. As set forth above, the relevant authority for the challenged provisions of the proposed rules is limited to sections 550.0251 and 550.105.

47. There is nothing in the rules cited as authority by the Division that specifically applies to jockeys, or authorizes the development of rules regulating the qualifications or uniforms of jockeys.

48. Applying the rulemaking standards, and the case law set forth herein, the undersigned concludes that the proposed "jockey" rules do not find specific authority in section 550.0251(3) regarding the adoption of rules related to "holding, conducting, and operating of all racetracks, race meets, and races held in this state."

49. The proposed "jockey" rules do not find specific authority in section 550.105(3), which applies to occupational licenses for certified public accountants and attorneys, and section 550.105(10)(a), which identifies the information necessary to establish the identity and good moral character of an applicant for an occupational license.

50. Proposed rules 61D-2.028(2)(a)-(d), (6), (7), and (8) exceed the Division's grant of rulemaking authority, enlarge and modify the specific provisions of law implemented, and fail to implement or interpret the specific powers and duties granted by sections 550.0251 and 550.105, and are therefore invalid exercises of delegated legislative authority as defined in sections 120.52(8)(b) and (c), and the flush left paragraph.

51. The proposed "jockey" rules are straight-forward and understandable. No evidence was offered as to any misunderstanding of their terms. Thus, the proposed "jockey" rules are not "so vague that persons of common intelligence must guess at its meaning and differ as to [their] application." Dep't of Fin. Servs. v. Peter R. Brown Constr., Inc., 108 So. 3d 723, 728 (Fla. 1st DCA 2013); see also Sw. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 915 (Fla 2d DCA 2001). Based thereon, proposed rules 61D-2.028(2)(a)-(d), (6), (7), and (8) are not invalid exercises of delegated legislative authority as defined in section 120.52(8)(d).

The "Publication" Rule - Proposed Rule 61D-2.029

52. Proposed rule 61D-2.029 provides that:

> Before a horse is allowed to start, the horserace permitholder shall ensure that at least the three most recent published past runnings, whether in races or workouts, are available to the public for review. At least one published running must be from within 45 days of that race.

53. Rulemaking authority for proposed rule 61D-2.029 is cited as section 550.0251(3). The law implemented by proposed rule 61D-2.029 is cited as section 550.0251.

54. Proposed rule 61D-2.029 is challenged as being in violation of section 120.52(8)(b), (c), and (d), and the flush-left paragraph.

55. As established by testimony taken at the July 20, 2015, public hearing, information regarding past performance of horses is designed to aid the betting public as to the qualifications of race entrants.

56. Applying the rulemaking standards, and the case law set forth herein, the undersigned concludes that the proposed "publication" rule does not find specific authority in the requirement to adopt rules related to "holding, conducting, and operating of all racetracks, race meets, and races held in this state." Thus, proposed rule 61D-2.029 exceeds the Division's grant of rulemaking authority, enlarges and modifies the specific provisions of law implemented, and fails to implement or interpret the specific powers and duties granted by section 550.0251, and is therefore an invalid exercise of delegated legislative authority as defined in sections 120.52(8)(b) and (c), and the flush left paragraph.

57. Petitioner argued convincingly that proposed rule 61D-2.029 is impermissibly vague. The proposed rule does not define what is meant by "past performances," or the means or location of publication. The comments provided at the public hearing expressed confusion as to what was meant by the term "at least three published past performances," and whether publication meant publication in a track program, or publication to a national database, with a witness testifying that "if we leave

this as written, it's extremely vague, and it's not reliable information." The Division has not explained what is meant by the rule, offering at oral argument only that interpretive guidance could be distributed to quell any confusion. Given the requirement that the terms in a proposed rule be given "their common and ordinary meaning," proposed rule 61D-2.029 is "so vague that persons of common intelligence must guess at its meaning and differ as to its application." Dep't of Fin. Servs. v. Peter R. Brown Constr., Inc., 108 So. 3d at 723; see also Sw. Fla. Water Mgmt. Dist. v. Charlotte County, 774 So. 2d at 915. Based thereon, proposed rule 61D-2.029 is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(d).

ORDER

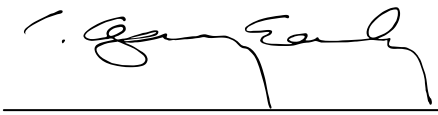
Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Proposed rule 61D-2.024(5) and proposed rules 61D-025(1), (2), (4), (7) and (8)(a) are not invalid exercises of delegated legislative authority. Accordingly, North Florida Horsemen's Association, Inc.' Amended Petition to Determine Invalidity of Proposed Rules as to those proposed rules is dismissed.

2. Proposed rules 61D-2.028(2)(a)-(d), (6), (7), and (8); and proposed rule 61D-2.029 are invalid exercises of delegated legislative authority.

3. Jurisdiction is retained for the purpose of determining reasonable attorney's fees and costs pursuant to section 120.595(2). Any motion to determine fees and costs shall be filed within 60 days of the issuance of this Final Order.

DONE AND ORDERED this 29th day of January, 2016, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.