

RACING COMMISSION

Agency Regulatory Review Report Format

Executive Order Number 3-18, Regulatory Review, signed by Governor Justice on January 10th, 2018, requires executive agencies with rule-making authority to provide a regulatory review report to the Governor's Office and the Legislative Rule-Making Review Committee. Please provide the following information in said report on or before November 1, 2018.

I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Thoroughbred Racing 178 CSR 1 – This legislative rule governs all aspects of Thoroughbred Racing including the requirements for and duties of racing officials; the requirements for the issuance of licenses to racetracks and the duties and obligations of racetracks; the requirements for the issuance of permits to racing participants and the standards to which a racing participant must adhere or face adverse action against their permit; the requirements for claiming racing; the running of races; the requirements related to permissible and non-permissible medications in racing thoroughbreds and the post-race and out-of-competition testing of racing thoroughbreds; and, equine health and safety requirements.

- A. **Include the date of first promulgation.** The Secretary of State's website contains numerous iterations of the Thoroughbred Racing Rule, the earliest of which has an effective date of June 7, 1985. However, the Racing Commission was authorized to promulgate rules governing racing in 1935 around the time that racing was legalized and sanctioned by the West Virginia Legislature in the West Virginia Code. West Virginia case law demonstrates that the West Virginia Racing Commission enacted comprehensive rules governing horse racing under the pari-mutuel system in the mid to late 1930s. Indeed, in *State ex rel. Morris v. West Virginia Racing Commission*, 133 W. Va. 179, 55 S.E.2d 263 (1949), a case pertaining to the enforcement of racing rules against a permit holder, the West Virginia Supreme Court quotes and applies several rules pertaining to post-race testing of thoroughbreds and the responsibility for medication positives in thoroughbreds. These rules are described by the Supreme Court as having been enacted by the Racing Commission pursuant to its statutory grant of rulemaking authority set forth in the 1935 Racing Act. Therefore, it is believed that the Racing Commission has had in

place rules governing Thoroughbred Racing since the mid to late 1930s. The Racing Commission does not have ready access to these historical rules so as to provide an exact date of first promulgation. But, given the discussion in the *Morris* case, it appears that various versions of the Thoroughbred Racing rule have existed since around the inception of legalized racing in this State in the 1930s.

- B. Subsequent modifications. Because of the lack of ready access to historical versions of the rule pre-dating the 1985 version on the Secretary of State's website, it is impossible to recount every modification to the Thoroughbred Racing Rule since the 1930s. However, the Secretary of State's website shows that the rule was amended effective June 7, 1985, April 4, 1988, May 3, 1989, April 2, 1990, April 9, 1991, April 1, 1992, June 9, 1993, May 1, 1994, April 3, 2000, July 1, 2001, May 31, 2004, June 6, 2005, April 6, 2007, July 10, 2011, August 14, 2013, July 9, 2014, June 28, 2015, June 2, 2017 and June 27, 2018. In addition, proposed amendments are now pending legislative approval during the 2019 Legislative session.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. The continued existence of this rule is necessary to regulate Thoroughbred Racing. The racing statutes are considerably sparse and give broad authority to the Racing Commission to promulgate rules in this area. Absent such rules, the Commission would have nothing in place in statute that would address a myriad of health, safety and integrity issues that are critical to the regulation of Thoroughbred Racing. For example, absent the rule, there would be nothing governing specific medications in horses, the testing of horses, the standard of conduct for permit holders, etc. Indeed, West Virginia Code 19-23-2(a), 19-23-3(17), 19-23-6 and 19-23-8(g) specifically direct the Racing Commission to promulgate rules that regulate Thoroughbred Racing. The rule is currently pending a proposed modification addressing jockey welfare and concussion protocols for the 2019 Legislative Session. This rule will undoubtedly be required to be modified from time to time in future rulemaking cycles to keep abreast of industry standards.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. The reasons for the continued need for the Thoroughbred Racing Rule are generally discussed in Section II above. The proposed modification pending action during the 2019 Legislative Session is necessary to ensure the health and welfare of jockeys.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. With regard to the currently pending proposed modification related to jockey concussion protocols, all stakeholders (racetracks, horsemen and jockeys) were notified of the proposed amendments during the public comment period. The Commission actually made changes to the rule based upon comments from the Jockeys' Guild and Charles Town Racetrack. The continued existence of the Rule in general affects all racing stakeholders including racetracks, horsemen, jockeys, equine veterinarians, the wagering public, etc. Given that every racing jurisdiction in the United States and abroad that conducts Thoroughbred Racing has similar or, in some instances, the same regulations in place to regulate Thoroughbred Racing, West Virginia is in the main stream of regulation in this area.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Determining the Organizations to Represent the Horsemen in the State 178 CSR 1A –

This procedural rule sets forth the procedure to be followed for determining the organization that represents the majority of the horsemen at a licensed Thoroughbred racetrack in West Virginia.

- A. **Include the date of first promulgation.** There is only one version of this rule contained on the West Virginia Secretary of State's website with an effective date of March 4, 1996. It is unknown whether or not any previous version of this rule existed with an earlier date of promulgation.
- B. **Subsequent modifications.** The rule has not been modified since 1996, but it is unknown whether or not previous versions of this rule existed prior to the 1996 version.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. This procedural rule needs to continue to exist. But, given the amount of time that has passed since the 1996 rule was promulgated, it needs to be reviewed for possible amendments. The primary impetus for this rule is the Federal Interstate Horseracing Act of 1978, 15 U.S.C. ch. 57, and other West Virginia Code provisions, particularly W. Va. Code 19-23-12b(b), which require the racetracks and the Racing Commission to interact with the organizations that represents the majority of the horsemen at a racetrack in specific contexts. Pursuant to the Federal Interstate Horseracing Act, interstate off-track wagers cannot be accepted by an off-track betting entity unless the host racetrack (in West Virginia, that would be Mountaineer or Charles Town racetracks) has the written consent of the "horsemen's group," which is defined in federal law as "the group which represents the majority of owners and trainers" at the racetrack. Therefore, the licensed racetracks in West Virginia that desire to simulcast their races to out-of-state betting facilities and reap the benefits of wagering dollars on those races have to have a written contract with the organization representing the majority of

the horsemen at that track. In addition W. Va. Code 19-23-12b(b) requires the Racing Commission to notify the organization representing the majority of owners and trainers at a racetrack if the racetrack requests to run less than the statutorily required number of race days in a calendar year. After such notification, if the organization objects to the reduction in days, then the Commission is required to conduct a public hearing and undergo certain processes in order to determine the allowed number of racing days. Accordingly, there has to be some sort of mechanism or process by which the organization representing the majority of owners and trainers at each racetrack is actually determined to allow licensed racetracks and the Commission to fulfill their federal and state statutory obligations. This rule governs the balloting and election process for such majority organizations to be established and recognized.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. The reasons for the continued need for this procedural rule are generally discussed in Section II above. The Racing Commission should review this rule with affected constituents to determine whether or not it needs to be updated and amended. Given the routine requests from the Thoroughbred racetracks for reductions in the number of race days over the past few years, the Racing Commission has had to specifically invoke W. Va. Code 19-23-12b(b). And, because of some ambiguities in how the statute and the procedural rule are worded, there have been questions about who has standing on behalf of the majority organizations to lodge objections to reductions in race days. This is one area in which amendments to the procedural rule could provide clarification.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. The continued existence and possible future amendments to this rule affect all racing stakeholders, but particularly the horsemen and the racetracks.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Greyhound Racing 178 CSR 2 – This legislative rule governs all aspects of Greyhound Racing including the requirements and duties of racing officials; the requirements for the issuance of licenses to racetracks and the duties and obligations of racetracks; the requirements for issuance of permits to racing participants and the standards to which racing participants must adhere or face adverse action against their permit; the running of races, the requirements related to testing and medications in greyhounds and greyhound health and safety requirements.

- A. **Include the date of first promulgation.** The Secretary of State's website contains numerous iterations of the Greyhound Racing Rule, the earliest of which has an effective date of April 18, 1983. However, Greyhound Racing was legalized in West Virginia in 1975 with the passage of a bill that amended the racing statutes. Therefore, it is highly likely that the Racing Commission enacted Greyhound Racing rules prior to 1983. The Racing Commission does not have ready access to historical versions of the rule prior to 1983 so as to provide an exact date of first promulgation.
- B. **Subsequent modifications.** Because of the lack of ready access to historical versions of the rule predating the 1983 version on the Secretary of State's website, it is impossible to recount every modification to the Greyhound Racing Rule since 1975. However, the Secretary of State's website shows that the rule was amended effective April 18, 1983, June 7, 1985, April 1, 1988, May 3, 1989, April 2, 1990, April 9, 1991, April 1, 1992, June 9, 1993, May 1, 1994, April 3, 2000, May 31, 2004, May 10, 2006, July 1, 2009, July 10, 2011 and August 14, 2013.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. The continued existence of this rule is necessary to regulate Greyhound Racing. The racing statutes are considerably sparse and give broad authority to the Racing Commission to promulgate rules in this area. Absent

such rules, the Racing Commission would have nothing in place in statute that would address a myriad of health, safety and integrity issues that are critical to the regulation of Greyhound Racing. Indeed, West Virginia Code 19-23-2(a), 19-23-3(17), 19-23-6, and 19-23-8(g) specifically direct the Racing Commission to promulgate rules that regulate Greyhound Racing. The last time that the Commission examined and gained Legislative approval to amend this rule was in 2013. Because of the uncertainties regarding the continued existence of Greyhound Racing, the Commission has not sought to amend this rule for several years. If Greyhound Racing is to continue to exist in West Virginia, this rule will need to be reviewed and revisited in the near future for possible amendments to keep it current with industry standards.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. The reasons for the continued need for the Greyhound Racing Rule are generally discussed in Section II above. Since the rule has not been amended since 2013, it is likely that the rule will need to be reviewed and amendments considered to keep it current with industry standards.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. The continued existence of the rule and possible future amendments affects all racing stakeholders including racetracks, greyhound owners, kennel owners, the wagering public, etc. Given that every racing jurisdiction in the United States that conducts greyhound racing has similar regulations in place to regulate Greyhound Racing, West Virginia is in the main stream of regulation in this area.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Notice and Conduct of Meetings 178 CSR 3 – This procedural rule governs the procedure for meetings conducted by the Racing Commission.

- A. **Include the date of first promulgation.** The Secretary of State's website contains one previous version of this rule that went into effect on December 10, 1982. The current rule went effective on July 22, 2016. It is unknown whether or not there are versions pre-dating the 1982 rule contained on the Secretary of State's website.
- B. **Subsequent modifications.** The rule was most recently modified on July 22, 2016.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. This rule needs to continue to exist because it is required by W. Va. Code 6-9A-3, a provision of the Open Governmental Proceedings Act that requires governing bodies to promulgate rules governing their open meetings. Given that the rule was recently revised in 2016, it does not appear to need to be changed at this time.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. The reasons for the recommendation are set forth in Section II above.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. All racing stakeholders and the public in general are affected by the continued existence of this rule.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Dispute Resolution Procedures 178 CSR 4 – This procedural rule sets forth administrative hearing procedure to be used when resolving policy disputes and issues and deciding all other controversies between the Racing Commission, licensees, prospective licensees and persons whose applications have been denied.

- a. **Include the date of first promulgation.** The Secretary of State's website contains one version of this rule that went into effect on September 30, 1991. It is unknown whether an earlier version of this rule existed.
- b. **Subsequent modifications.** There have been no modifications to the rule since it went effective in 1991.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. This procedural rule can be repealed.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. This procedural rule can be repealed because the Racing Commission has a procedural rule, 178 CSR 6, Due Process and Hearings (effective January 21, 2017), that is more current and that governs the administrative hearing procedures for contested cases. This rule is duplicative and is outdated.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. Inasmuch as a more current procedural rule exists, (178 CSR 6, Due Process and Hearings), that governs the subject matter covered by this outdated rule, the repeal of this rule should have no effect on any racing stakeholders.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Pari Mutuel Wagering 178 CSR 5 -- This legislative rule governs the types of wagers which may be placed at the Thoroughbred and Greyhound racetracks and all aspects of the pari mutuel wagering process and systems at the racetracks.

- A. **Include the date of first promulgation.** The Secretary of State's website contains several iterations of the Pari Mutuel Wagering Rule, the earliest of which has an effective date of June 9, 1993. However, the Racing Commission was authorized to promulgate rules governing pari mutuel wagering on horse racing in 1935, around the time that racing was legalized and sanctioned by the West Virginia Legislature in the West Virginia Code. It is believed that the Racing Commission has had rules governing Pari Mutuel Wagering since the advent of legalized racing in the 1930s. The Racing Commission does not have ready access to historical rules, pre-dating those contained on the Secretary of State's website, in order to provide an exact date of first promulgation.
- B. **Subsequent modifications.** Because of the lack of ready access to historical versions of the rule pre-dating the 1993 version on the Secretary of State's website, it is impossible to recount every modification to the Pari Mutuel Wagering Rule since the 1930s. However, the Secretary of State's website shows that the rule was amended effective June 9, 1993, April 3, 2000, June 10, 2011, August 14, 2013 and August 1, 2017.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. The continued existence of this rule is necessary to regulate wagering at the Thoroughbred and Greyhound racetracks. The racing statutes contain almost no provisions governing wagering. Absent the rule, there would be a complete vacuum of regulation of wagering at the racetracks. West Virginia Code 19-23-6(3) specifically directs the Commission to promulgate a stand-alone rule governing pari mutuel wagering. This rule satisfies that statutory

requirement. The last time that proposed amendments to the rule were adopted by the Legislature was 2017. The Racing Commission has had recent constituent requests to amend the rule. However, because of the Governor's recent moratorium on rules, the Racing Commission has chosen not to undergo the necessary process to amend the rule. It is likely that this rule will need to be modified in future rulemaking cycles to be responsive to constituent requests and to keep the rule current with industry standards.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. The reasons for the continued need for the Pari Mutel Wagering Rule are generally discussed in Section II above. Future amendments will likely be necessary to keep the rule current.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. The continued existence of this rule and possible future amendments affect all Thoroughbred and Greyhound stakeholders, including racetracks, horsemen, greyhound owners, kennel owners, veterinarians, jockeys, the wagering public, etc.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Due Process and Hearings 178 CSR 6 – This procedural rule specifies the procedures for hearings conducted before the Board of Stewards, the Board of Judges and the Racing Commission.

- A. **Include the date of first promulgation.** The earliest version of this procedural rule contained on the Secretary of State's website has an effective date of May 7, 2011. It is unknown whether an earlier version of this rule existed.
- B. **Subsequent modifications.** This procedural rule was modified effective April 21, 2012, and most recently on January 21, 2017.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. This rule is necessary to continue to exist to govern the Commission's contested case hearings. Inasmuch as it was recently amended in 2017, there appears to be no need to amend or change it at this time.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. The rule was most recently amended in 2017 and is relatively current. Therefore, no amendments appear to be necessary at this time.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. All racing stakeholders, including track licensees and racing permit holders are affected by the continued existence of this rule.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Simulcast Pari-Mutuel Wagering at Authorized Gaming Facility in Historic Resort Hotel 178 CSR 7 – This legislative rule governs the conducting of simulcast pari-mutuel wagering on horse and dog races in the historic resort hotel in this state.

- a. **Include the date of first promulgation.** The only version of this rule went into effect on April 16, 2012.
- b. **Subsequent modifications.** The rule has not been modified since 2012.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. This rule needs to continue to exist and does not appear to need to be modified or amended at this time.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. In 2011, the Legislature authorized pari-mutuel wagering on simulcast horse and dog races at the historic resort hotel, the Greenbrier. West Virginia Code 19-23-12d(n) authorized the Commission to promulgate rules governing such wagering. The Commission's Pari-Mutuel Wagering Rule, 178 CSR 5, was not written, nor structured, to regulate simulcast pari-mutuel wagering since it was established to govern wagering at facilities wherein live racing occurs. Therefore, this rule was necessary to govern the simulcast wagering at the Greenbrier. The Commission is unaware of any need to amend this rule at this time.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. Since no modification or repeal is necessary at this time, no stakeholders are affected. However, the historic resort hotel, those who wager on simulcast races at the hotel and the State of West Virginia are all affected by the continued existence of this rule.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Racing Interpretive Rule 178 CSR 8 – This interpretive rule “clarifies” the process the Racing Commission uses to verify the bona fide residency requirement in statute for the payment of certain incentives to greyhound and thoroughbred racing participants.

- A. **Include the date of first promulgation.** This interpretive rule first went into effect on September 5, 2013.
- B. **Subsequent modifications.** This rule has not been modified since it went into effect in 2013.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. Consideration should be given to amending the title of this rule to something more specific than “Racing Interpretive Rule” and to changing this rule from interpretive to procedural. The crux of this rule is to establish a procedure to determine residency for certain greyhound and thoroughbred incentive payments. Therefore, it is not, strictly speaking, interpretative in nature. It is more procedural in nature. Moreover, the title of the rule would be more descriptive and transparent if it identified the subject matter of the rule, as opposed to the more generic “Racing Interpretive Rule.” The title is too vague to notify the public as to its subject.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. The reasons for the proposed modifications are set forth in Section II above.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. The proposed modifications would not adversely affect any racing stakeholders. Indeed, the proposed modifications would enhance the transparency of the rule and would make it more readily understandable by constituents.

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I. DESCRIPTION OF EACH RULE UNDER THE AGENCY'S JURISDICTION.

Reimbursement of Capital Reinvestment Projects 178 CSR 9 – This procedural rule specifies the procedures for disbursement of funds by the Racing Commission to thoroughbred and greyhound racetracks for expenditures upon capital improvements as authorized in West Virginia Code 19-23-13c(b)(3)(A), (B) and (C) and 19-23-13c(c).

A. **Include the date of first promulgation.** This procedural rule first went effective on July 11, 2014.

B. **Subsequent modifications.** There have no modifications to this procedural rule since 2014.

II. RECOMMENDATION OF WHETHER THE RULE SHOULD BE UNCHANGED, MODIFIED OR REPEALED. This rule needs to continue to exist to provide a structural process for the reimbursement of capital improvements at the racetracks as authorized in the West Virginia Code. The Commission is unaware of any current need to modify this procedural rule.

III. REASONS FOR THE RECOMMENDATION BY THE AGENCY. See the response in Section II above.

IV. IF RECOMMENDATION IS FOR MODIFICATION OR REPEAL, IDENTIFY STAKEHOLDERS AFFECTED. Since the Commission is not recommending modification or repeal of this procedural rule, no stakeholders are affected. The continued existence of this rule is beneficial and necessary to all racing stakeholders to ensure transparency in disbursing these funds.