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**New Strategies in Regulating the Race — Ensuring  
There Continues to Be Racing to Regulate**

**MODERATOR:**

**Paul Estok**, Executive Vice President and General Counsel, Harness Tracks of America

**SPEAKERS:**

**Madeline Auerbach**, Chair, California Retirement Management Account

**Dr. Jennifer Durenberger**, Director of Racing, Massachusetts Gaming Commission

**Alan Foreman**, Chairman and CEO, Thoroughbred Horsemen's Assoc., Inc.

**Steven Lehman**, CEO, Ontario Racing Commission

**Andrew Turro**, Attorney at Law, Meyer, Suzzo, English & Klein, P.C

**Ms. Wendy Davis:** A lot of bright faces out there. I'd certainly like to thank last night's reception sponsor. That was Roberts Communications. You know without all of our wonderful sponsors, we couldn't put our symposium on. Please, if you see these folks, say thank you. We really appreciate them being here and helping us put on the show.

This morning's breakfast sponsor was Incompass. The break after this panel session has been sponsored by Prairie Meadows Racetrack and Casino. Again, thank you so very much.

This morning's content is done in collaboration with Harness Tracks of America. Today our moderator is Paul Estok from the HTA. Without taking up any further time, I'd like to introduce Paul. He's going to oversee this panel session. Thanks so much Paul. Thank you for all the help that HTA gives us in putting these sessions together.

**Paul Estok:** Thanks Wendy. It really isn't that much work putting some of these panel sessions together. It's more like I get the fun part which is throwing ideas out. Don't have to do much other than that.

This morning's panel came about through sessions that Doug Reed has with the faculty at the program where they do some brainstorming about panels. There

topics come up and things you think about and issues of the day kind of were the things we were talking about.

We were talking about regulation and Out-of-Competition Testing and what's happening with it. As you can imagine, you get into those sorts of discussions and you end up with things like, "Well, will anyone be willing to speak? Can we find somebody?" Doug and Wendy and Liz managed to do a heck of a job putting together a panel because not only do you have some — did we find people who were willing to speak, we found key people who were willing to speak on a variety of topics.

Without further ado, I'm going to introduce our first speaker. What'll happen is they're gonna get up and talk. If you feel inclined to jump up and run to a microphone and ask a question, that's fine. Otherwise, at the end hopefully we'll have some time for questions, comments.

I know we got a couple of PowerPoint presentations that are really good, actually educational stuff here. Relax and enjoy. Having said that, without any further ado, I'm gonna introduce our first speaker, founder and Chairman of the Board of the California Retirement Management Account, CARMA, Madeline Auerbach.

**Ms. Madeline Auerbach:** All right. I thought I was last. I was supposed to be last —

**Mr. Paul Estok:** Do you wanna —

**Ms. Madeline Auerbach:** - because —

**Mr. Paul Estok:** - be last?

**Ms. Madeline Auerbach:** I have to be because I have a big presentation to do. I have people that aren't here yet.

**Ms. Madeline Auerbach:** We have a little timeout.

**Mr. Paul Estok:** Apparently Madeline has people who aren't here yet who are —

**Ms. Madeline Auerbach:** Because we were told we were going to be presenting about 9:30.

**Mr. Paul Estok:** - critical to her presentation

**[Laughter]**

**Ms. Madeline Auerbach:** I'm sorry.

**Mr. Paul Estok:** I guess we'll go with the next on the list who's Jen Durenberger. Are you ready?

**Dr. Jen Durenberger:** Wow. The process is confusing to all of us. I actually didn't bring any prepared remarks but I can contribute in this manner.

Wendy Davis and I, at a Racing Officials Accreditation Program and a few other people, we started brainstorming on some of these issues, some of the things that our moderator has put together in the introduction to this panel.

What we discovered very quickly as we started brainstorming was that all of these issues regarding out-of-competition testing, doing less with more, creative strategies, affective oversight, the changing business model of the industry, how we deal with that, we very quickly learned that we had more questions than answers. I think that was part of the genesis of this panel.

I come to you from the Massachusetts Gaming Commission. Massachusetts is one of those industries right now that is in a state of flux.

For a number of years I was a regulatory veterinarian in New York and California. I used to watch in the press these jurisdictions that to me were small jurisdictions. I would watch these changing things play out in the media.

I would think, "Wow, I'm glad I'm not in that state right now while we try to figure out what's going on." Now I find myself in one of those states.

I come to you as the Director of Racing in a state that has Thoroughbred and Harness racing at the moment. I come to offer the regulator's perspective.

I've been on the ground as a regulatory veterinarian. I can talk to you about some of the enforcement issues that are unique to what we're trying to do in the industry right now both at the on the ground level and now at the enforcement level. I'm here to offer perspective.

I'm very interested in hearing what the panelists to my right have brought. If you get me rolling, I won't stop talking. I would encourage the moderator to limit my questions and answers

**[Laughter]**

**Mr. Paul Estok:** All right. One of the people I know has a presentation ready for you guys is Steven Lehman from Ontario. I hope he'll go next.

**Dr. Jen Durenberger:** I can get up and talk but I'd have to get up again. Is that—

**Mr. Paul Estok:** No, that's okay.

**Mr. Steven Lehman:** Thanks Paul. Okay, I'm Steve Lehman, Executive Director and CEO for the Ontario Racing Commission. That's Ontario, Canada not Ontario, California as you can probably tell from my accent.

What I was thinking I would do today is I wanna speak a little bit about Ontario itself statistically so you can put some perspective and some context around what I'm gonna say.

Then there's three areas of regulation I wanna try to cover off. One being the basic adjudication role, second being equine medication control and the last one being intelligence-led regulation.

Ontario, and I'm relying primarily on 2012 statistics, we race all three breeds. In 2012 we had around 1600 race days. As many of you know there's been a decline due to some decisions by government around our slots programs. We'll be racing probably just over 900 in 2013. My friend Sean Pinsonneault from Woodbine will be speaking a little bit of what's going on in Ontario. I encourage you to come out and listen to that.

I won't comment as a civil servant very much on the decisions of government but I'm sure Sean will have some interesting things to say.

In 2012 at least had 16 race tracks across our province, 15 of them raced this year so there hasn't been a significant loss in the number of tracks that are actually racing.

Just for you geography buffs, that's over 668,000 square miles that we're required to cover. If any of you are really geeky and into metric, that's over a million square kilometers.

Last year we legally wagered about \$935 million on horseracing in the province of Ontario. Even with the significant you're looking at over 40 percent decline in race days.

We're still gonna probably do about \$865 million. That's due to the strength of our simulcast parlors and our off-track betting facilities.

We license over 20,000 licensees, issued over 1,300 rulings.

Just for a context nationally, Ontario represents about two-thirds of all the wagering in Canada.

The first thing I'm gonna talk about is adjudication.

One of the new things that we've come up with in the last couple years is a central adjudication room.

If you're familiar with pro sports, most sports have the war room they go back to. This is our concept of the war room. We have a senior judge or steward who sits at head office and uses real time technology.

I'll give another shout out to Roberts. Roberts was the one who helped us set this up.

That central steward or judge has the opportunity to watch the video streaming from the various places that are sending their signal up. And participate in the deliberations at the track through telephone system.

Now what this allowed us to do is eliminate a senior judge or steward at every single track that's racing and consolidate it down into one centralized one. It has reduced the personnel at the track providing some modest cost savings.

One of the byproducts we found by doing something innovative like this is it's actually allowed us to have independent of the individual race tracks sort of community but completely consistent set of eyes looking at things. Of course we pick our best of our best to sit in that room.

They're constantly having a level of quality helping the two track-based officials that are on the ground. Has been a huge success for us from an adjudication standpoint with no degradation in the quality of the adjudication of the races at all with only two judges in the stand at the track.

The next thing I wanna talk to you about is equine medication control and the relationships between the Canadian Pari-Mutuel Agency and the ORC in Canada.

Canadian Pari-Mutuel Agency, the federal agency, runs the Race Day Testing Program, oversight of the TCO2 Testing Program as well as having — you've probably heard the term Jerseyville.

We have a research facility that runs equine research and science. The ORC on the other hand, the provincial body, actually does the adjudication of the Certificate of Positive Tests.

Once a positive test comes from the CPMA, we take over from there. Sharing of resources and intelligence, so we feed a lot of information up to them.

As a matter of fact, Jerseyville that I just mentioned is doing the research. Our Manager of Veterinarian Services, Dr. Adam Chambers is also the guy who runs Jerseyville. We actually cost-share a vet.

It provides obviously some good synergies as far as sharing of the resources financially as well as having the federal and provincial on the same level. Finally out-of-competition testing, I'll speak to in a separate slide later but just so you know, we do actually for about the last five years have been running an Out-of-Competition Testing Program in the province of Ontario.

One little thing that I wanna talk to before I getting out-of-competition testing is the pilot program we're running right now. It's primarily ingested efficiency. Our TCO2 blood samples were taken prior to the race by a vet tech.

We also had the CPMA run post-race testing where blood or urine samples were taken. This past season we've initiated a pilot where the collection of both samples were actually taken at the same time pre-race by a technician going back to the paddock stalls.

Basically that's allowed us to eliminate the stress on the test barn. We've also, just to make sure that nothing slips through the cracks and there is coverage — horses that are pulled the bloods pre-race also may be subject to post-race testing as well just to make sure that nothing is administered secretly in between when the blood gets drawn and when they actually race.

Just having that deterrent factor out there has been enough to make sure that we're managing our risks in that area. Finally just done in consultation with the horse people, track service provider like everybody was involved in this decision.

We worked with 'em to make sure that it wasn't gonna be a burden on the horse people.

That the track had the facilities and was willing to allow us to do this and the service provider obviously we have basically farmed out the collection and making sure that the service provider was okay with the idea.

It's still going on, the pilot project. We've had no problems. We've had almost no complaints from anybody involved.

I think this is something that we're probably gonna look at instituting moving forward as a way of just doing things more efficiently. That's being conducted at Western Fair Racetrack in Ontario.

I'll speak a little bit about the out-of-competition testing. What we were finding, and I'm sure these are common challenges in all the jurisdictions, is that we have stabling only for our Thoroughbreds.

Our Quarter Horses and our Standard-breds are primary ship-ins. That causes a shift from back stretch to private training centers and having less control over the areas in which the horses are staying and where the actual medication is being administered.

We also acknowledge openly that there are substances out there where benefits are lasting longer than whatever the elimination times and therefor the window to actually detect things — I point at things like EPO as an example of where — with the existing CPMA post-race testing.

You would have to have a pretty unsophisticated user in order to get caught. We've as I mentioned for about the last five years had an Out-of-Competition Testing Program that basically compliments but does obviously not replace the race day testing procedures that are conducted federally. We only do it with reasonable grounds.

What that means, if you've had a positive test. The trainer part of his arrangements of going back after his suspension would be to agree willingly like sign up to permit us to come onto the grounds.

Or if the judges notice a change in performance on a related horse that we just can't explain any other way. There's no change in equipment. There's nothing that the trainer can come up that looks like — that would be the type of reasonable grounds that would cause us to trigger people going onto the list for out-of-competition testing.

Similarly, it's intelligence based. If we've done searches and seizures, if we've had tips, things like that, that's the type of information that we would use to determine reasonable grounds to actually go onto the Out-of-Competition Testing Program for that trainer. Just to give you an idea of scale, in 2012 we had 37 separate occurrences where somebody did something to cause them to go onto the list. We probably tested close to 400 tests under that 37 occurrences. This year our numbers thankfully are down a little bit. We're about 26 year to date. That was as of a few days ago. Again we probably are 250ish tests on that Out-of-Competition Testing Program.

I also wanna talk a little bit about intelligence-led regulation. I got into it a little bit on the last slide, but in Ontario one of the ways that we actually manage our limited resources is to actually look at risk and priority based. We do have investigative forces out there that are gathering information but we also use just the simple people at the race track, confidential informants. Any sort of hands and eyes and ears that we have on the ground that can provide us information. We put it through an analysis process.

We actually have an intelligence officer who works with the OPP, Ontario Provincial Police, as well as our organization to analyze the information and start to put together paint-a-picture. We often use the analogy of intelligence analysis as a jigsaw puzzle. You get a piece from here and a piece from here. If you start getting enough pieces, you can build a picture that provides you with meaningful intelligence information. One of the things we discover and I actually pinched this slide off another presentation that we've done is that especially with the internet, there's an awful lot of traffic internationally with drugs and substances like the cobra venoms and things like that are coming into and out of Canada.

Everybody needs to be aware that this sort of stuff is going on and act on the intelligence information they have available to them. What we've started doing in acknowledging that this is way beyond Ontario, we've started establishing a lot of partnerships. What we're really looking at are partners who have similar strategic

goals that we have that are willing to share information and resources with us. Also, at the end of the day I have to, as full disclosure, I'm an accountant. I'm a CPA by trade. I look at net benefit and make sure that we're actually getting bang for our buck and that there's actually a benefit to sport in Ontario.

This may be the only slide you see that actually has non-equine stuff on it. The realization is as we work with the Canadian Center for Ethics in Sports, that's a human athlete organization as is the World Anti-Doping Agency. They work with the — we have the Pan Am Games coming to Ontario shortly. I think it's in 2015.

We also have Olympics coming up and things like that. These are agencies that work with humans as well. I used the example earlier about EPO and probably there's a name that jumps to mind when I mention that from a human testing standpoint but I'll also throw—there are other drugs.

We find that what ends up happening is the human world bleeds into the equine world and vice-versa. We've had those conversations with these agencies about sharing information. When heptamine, for example, ends up being tested positive in a horse, we can actually look and see that cyclists, swimmers, track and field athletes similarly have been test for the same type of positives.

We can start sharing information with those organizations. One of the practical things we do in order to share the information is a system that we call IRIS. It's the International Racing Intelligence and Information Service.

Basically it's an internet based secure communication to share an store data. We primarily share the information intelligence with other racing regulators, law enforcement agencies and industry organizations. It was established through the design of an international working group. It provides various levels of security clearance so that people are comfortable sharing their information on there, knowing who's using it and what it potentially will be used for. This is just a little bit of a tickler slide that I put in there. This is an actual screen shot of what our portal looks like.

Basically you see across the top there — I'll read it out because I know it's a little bit hard to read in the small font there. We have open access which is basically just a filing cabinet of all the stuff that you could go around to people's websites and pick off. It's basically public information we're putting out there. We also have restricted access which are investigative reports, rulings, things that you may not wanna put out publicly but are willing to share with other agencies and industry associations. Then there's the third party, which is the third one over.

That's a concept that we actually borrowed from the law enforcement world. What that does is — and I'm gonna pick on one of my panel members here or actually I'll pick on the moderator Paul. If Paul has something going on in his life and there's an investigation going on, we would actually flag Paul. We would flag the substance that Paul is distributing for example. What that would do is, all you



would be able to see on our system—there would be no information about the ongoing investigation but there would be contact information.

If you searched Paul, it would come up and say, “You need to speak to Ontario Provincial Police Detective Sergeant Garrett Lacey.” Give you his email address and his phone number so you could contact Detective Sergeant Lacey directly. He would actually make a determination of whether he was willing to share that information with you or not. You’d know something’s going on but there’s no information about what’s happening.

Then finally we have a work space. I like to refer to that as our sandbox. It allows jurisdictions to go in and work jointly on documents. Work through issues, discuss things and it’s non-published. It’s just a fun place to play and communicate.

Really what we’re trying to get at with that is — and I can appreciate the time differences that we’re dealing with cuz we’re dealing with places like Australia that’s on the other cycle of the clock to us.

It provides 24/7 access to a secure source of intelligence information. It assists in conducting risk assessments cuz as I mentioned before, a lot of what we do we look at the cost benefit of doing it. We prioritize things based on managing our risk. It provides obviously a place for communication amongst jurisdictions and agencies. We’d like to think it acts as a center of excellence where people can share best practices and ideas and resources. Finally it identifies areas where you may not be as strong as some other places and starts to identify some training opportunities for your organization.

This is probably most the important slide. We wanna try to wrap it up cuz so far I’ve talked about some pretty practical things. The lessons to take away from some of the things that Ontario is doing is cuz I know they’re not all gonna work in everybody’s jurisdiction but the central adjudication room for example. The simple message coming out of that is embrace technology and innovation wherever you can. There’s a lot of things that we’re still doing manually in this industry where we can do through automation a lot cheaper and more efficiently. Challenge the traditional. I heard a lot of naysayers saying that two judges in a stand just wouldn’t work.

The way our system would work is you had three because if there was a dissenting vote you could still have a majority sort of thing. We’ve managed to overcome those sort of naysayers with a system that actually seems to be working. Like I say, has the byproduct of consistency and independence that we probably underestimated before we actually implemented it. With respect to partnerships and I was actually trying to paint a picture of us running through fields of daisies with our arms extended with our federal partners to give them hugs because I get the sense that some of the stuff that’s going on around the federal government here makes people nervous. I can honestly stand up here and tell you, we have a great relationship with our federal regulator.

We share resources. We share information. We work together. As a matter of fact I was just checking my calendar for next week and we're having a conference call between the various provincial regulatory bodies and the federal government. I was speaking to them here as well. We spent a lot of time with one another. It's actually beneficial to work together.

One of the greatest ways you can actually cut costs out of your budget is stop people from doing stupid things. We spent a lot of time just working on deterrents and education.

I'll give you another example of a relationship with the CPMA, Dr. Adam Chambers who I mentioned earlier who works part-time for the CPMA and shared with us. He and I did a video that we ended up showing in the race paddocks explaining to horse people in really simple terms — and actually shot at the Jerseyville Farm. How people can avoid medication in error.

It's simple things about don't compound drugs. Be very aware of what the elimination times are. Just simple tips like that. We did an educational little video. We showed it in the paddock and got a fairly good reaction from the horse people about the efforts we were making in trying to educate and assist them as opposed to just regulate them in an authoritative sort of way.

Finally, when you're dealing with partnerships look big picture, think strategically of how other jurisdictions have things that can provide synergies for your jurisdiction and help you do a better job within your borders.

The out-of-competition testing really, at the end of the day, it simply came down to we addressed the systemic issue that we had. There are substances that people are gonna take. They're gonna provide benefit on race day that we just can't identify with post-race testing. We went after those systemic issues and addressed them in a way that we could actually get it done. We got it done not only with the cooperation of the horse people and the race tracks but actually having them help finance it as well while we got it up and running.

It's not become institutionalized that it's just a common part of what we do. Frankly, because of the approach we've taken where we only go after people who have reasonable grounds to be looked at, it's been widely accepted and not challenged in our jurisdiction. Finally, the intelligence led regulation stuff and the IRIS system. The simple message, and you're gonna hear it all the time, is, "Work smarter, not harder." You need to basically look at risks, look at where you're gonna get your best bang for your buck. The best way to do that is to know what's going on. Wherever you can, work together and share information.

It was interesting yesterday listening to the handicappers cuz a number of presenters came up and showed different things that were taking — I heard the term the phonebook of all this information and condensing it down into something that was actually usable and in most cases visual so people could see it. Really, that's what we're trying to do. We're trying to take a sea of information that little

bits and pieces on their own don't mean a lot but when you put it all together and apply some sort of methodology to analyze it, starts to paint a picture of what might be going on. That's an invaluable resource for being able to focus the limited resources you have on the areas where you're gonna get the most impact. That is it for me. My email address and phone number is there. I'm happy to take any follow-up questions as part of the panel.

**Audience Member:** Do you rotate your steward at the war room so that they're at the race track sometimes?

**Mr. Steven Lehman:** Absolutely. We've got a small pool. Probably about three or four people that do it all the time but it is three or four people. They're at the track sometimes but they're in-house sometimes. Thank you.

**Mr. Paul Estok:** Thanks Steve. Next up is a good friend of mine and somebody I've learned a lot from. Actually the guy I blame for me ending up going to law school, Alan Foreman.

Alan, he's listed in your program as Chairman and Chief Executive Officer, Thoroughbred Horsemen's Association but he's oh so much more than that these days so if you'll welcome Alan.

**Mr. Alan Foreman:** Thank you very much. Good morning. Paul indicated that he got key people to talk about out-of-competition testing. I'm not sure how I became a key person other than I took some heat this summer for comments I made in response to the presentation that was made that the Jockey Club about out-of-competition testing. I guess I've been around long enough to have seen how the Program of Out-of-Competition Testing and Racing evolved and I can talk about that.

Coincidentally, when I was here at the symposium three years ago — and I like to say over at Loews. I've been a creature of habit at Loews since the symposium started.

When I pulled into the parking lot after a session that I had done on the first Monday, there were television cameras everywhere. I asked one of the cameraman, "What's going on?" In a French accent he said, "Lance Armstrong." I said, "Lance Armstrong staying in the hotel?" "Yes, staying in the hotel." Well my longtime friend and law partner, Lou Almond's son Doug runs the Lance Armstrong Foundation. I've had some peripheral association with Lance Armstrong.

I called Lou. He got Doug on the phone. Doug said, "Lance is there. I'm coming out tonight. We'll have dinner. If you'd like, you can go riding with us tomorrow. We've got the sponsors here. Lance is training here in Tucson." I invited Lance to play golf cuz I know he likes to play golf. He invited me to go cycling. I went and played golf.

[laughter]

It was interesting because Lance knew my association with drug testing in the racing industry. I knew of his issues in cycling. We stayed away from it but it's just interesting how I end up today talking about out-of-competition testing at a time when I think what brings it to the forefront is the Lance Armstrong case in the past year, the al-Zarooni scandal in England.

Certainly, I don't think that in today's sport you can avoid the subject of out-of-competition testing. It's every sport, none the least racing.

Although there's some who at least this summer the in the blogosphere suggested that I was opposed to out-of-competition testing, nothing could be further from the truth.

I don't think you can ensure the integrity of this sport and have a credible testing program without doing out-of-competition testing. The problem is the issue is so misunderstood.

As I was watching people talk about it this summer, it was amazing to me how much they don't understand about out-of-competition testing. I thought I would take my time on out-of-competition testing to talk to you just a little bit about the history of what we do. Why we do it. What we're doing right now.

Andrew Turro, my friend and colleague, we actually collaborated in New York in the beginning. Because as this evolved, New York became the fertile ground for the clash between public policy and private rights, constitutional issues and the like over out-of-competition testing that you're gonna get in these areas. It's a normal part of the evolution of this issue. We may trip on each other whether it's with our slides or otherwise but Andrew has been very intimately involved in this. We may be talking a lot about the same thing.

As you know, you're sophisticated enough to know, in horseracing we do post-race testing. We're able to detect most if not all of the drugs that we are looking for on a daily basis through post-race testing because most of those drugs are relatively short acting.

We can catch perpetrators through our sophisticated drug testing. It is not illegal for a horse to carry in its body a drug when the horse is not racing. It is a violation of racing's rules for a horse to have in its body a drug during competition. That's what post-race testing is designed to do is to catch the horse that is carrying in its body a foreign substance.

We have horses on the racetrack. We have horses at training centers. We have horses at farms that are treated therapeutically and otherwise with medications. The fact that they have those medications in their systems when they are not racing is not a violation of any rule. There are substances however that do and can threaten the integrity of racing. They're the emerging drugs that we've been talking about for at least five years: the EPOs, the gene and blood doping agents,

the substances that abnormally oxygenate a horse's blood, proteins and peptides that have massive powerful analgesic effects to mask pain and certain drugs that are long acting that can affect a horse's performance and the horse's condition.

The problem with those substances is, they are effective far beyond the capability of the laboratory to detect them. That's the generation of drugs that we need to be concerned about. That's the generation of drugs for which out-of-competition testing is targeted. Racing began addressing these substances about seven years ago. It started with the RMTC in collaboration with RCI.

The question was, "If we're gonna do out-of-competition testing — which had everybody nervous about what that meant given that horses are permitted to have drugs in their system when they are not racing. "How can we have an effective Out-of-Competition Testing Program and yet limit it to the drugs that we need to limit it to and to go after those new substances that are emerging that are really the true threat to racing?"

It's no accident that the substances that we've targeted are the very same substances that they've targeted in the Olympic movement, the National Football League, Major League Baseball.

They're not talking about the drugs that we take on a daily basis.

They're not talking about the drugs that we see in racing and were so much far more sophisticated than these other sports when it comes to the ability to have a drug in your system on the day of competition.

It's the gene and blood doping agents that are the concerns of all sport. We began examining it. We came up with a model rule somewhere in 2007, 2008, and 2009 through the RMTC. We brought that rule to RCI. RCI adopted a model rule and I'll get that to you in a minute.

What really accelerated the Thoroughbred industry's interest in out-of-competition testing was the tragic death on the racetrack of Eight Belles in 2008. Because it forced the thoroughbred industry to go through a period of tremendous introspection to look at those issues dealing with the safety and welfare the horse. It led with a number of reforms that were being implemented by the thoroughbred industry to the creation of the NTRA Safety and Integrity Alliance.

The establishment of a code of standards dealing with the welfare and safety of the animal, the fairness of competition and what we could do to ensure to the public that what we were doing was right by our animals, was right by our sport and right for the integrity for our sport.

Among those requirements in the code of standards was that any racetrack that was seeking accreditation, its jurisdiction had to implement an out-of-competition testing rule and an out-of-competition testing protocol.

Because of that and because of the interest of the Thoroughbred industry in the safety and welfare of the animal, currently 24 racetracks which covers all major racing jurisdictions except one, Florida, not surprisingly, have enacted out-of-competition testing requirements. What does this mean?

If I could get the first slide on. Let me do just a comparison between — this is a very cursory comparison. You could spend two, three hours on this. A comparison of the Olympics to thoroughbred racing — I mean Thoroughbred center racing to the racing industry.

As you know, out-of-competition testing is done for Olympic athletes but it's only done for the top 50 athletes in the world and the top 15 athletes in a discipline in the United States or in any country.

That out-of-competition testing occurs one year prior to the Olympic Games. You know the Olympics run every four years. They're testing one year prior to competition. They're only testing the elite athletes. We know because there was much made in the media about Lindsay Vaughn walking down the red carpet with Tiger Woods at some gala this year. One of the Olympic drug testers grabbed her and made her submit to a test.

What they do is they have drug testers all over the world who are assigned to go to the athletes. The athletes have to submit to a test.

In the Olympic movement it isn't just that you have to take the test, you can fail the test or if you miss a test that's required or refuse to take the test, you can be barred from competition. My point is, you're dealing with the elite athletes when you're talking about out-of-competition testing in the Olympic movement. Which is the arrow?

Next slide.

What do the Olympics test for? What is USADA? Which is the American Testing Agency and you've read a lot about USADA in the past few weeks. What are they looking for?

Well they're looking for non-approved substances. Substances that somewhere down the road can emerge that have the potential to effect performance. They're designer drugs. Well we're interested in designer drugs.

They ban anabolic steroids. We prohibit anabolic steroids in racing. We permit them in training to the extent that anabolics are even used any longer. I will get to that. They're looking at anabolic steroids because they're looking at the ability to build up the body and improve performance beyond a human's natural abilities.

They're looking at hormone antagonists modulators, Beta2-agonist, enhancement of oxygen transfer, gene doping, blood doping, chemical and physical manipulation. When you look at what racing is doing, we're targeting the same things. We're

targeting the gene and blood doping agents. We're actually going beyond that because we have to be concerned about masking pain. We go after the protein peptides, the venoms, those very powerful painkillers that are very difficult to detect and are very long acting beyond the period of detection.

I think that we compare favorably to the Olympic movement to the extent that there's some notion that the Olympics do it far more extensively than we do. While they're actual testing may be more extensive because they're dealing with a very small, limited pool that they can target.

We're looking for the same things as all other sports are when it comes to out-of-competition testing. RCI adopted the model rule. I just, without going through the model rule, wanted you to see that the industry adopted a model rule. It's not comprehensive to the extent of establishing protocols on how you actually carry it out.

It basically requires random testing, cooperation with the testers, and looking for, and you can see under prohibited substances, blood doping agents, EPO, darbepoetin, gene doping agents.

As is typical in racing, the jurisdictions began to adopt out-of-competition testing.

New York was one of the first because New York — NYRA wanted an out-of-competition testing rule for its racing and the integrity of its racing. NYRA tracks wanted to get accreditation. In order to get accreditation they needed to adopt a rule.

The New York Racing and Wagering Board proposes an out-of-competition testing rule. You saw that the RCI rule was four or five paragraphs as is typical in New York. We get four pages of proposed regulations. I'm gonna let Andrew deal with most of it. It was fatally flawed on its face for any number of reasons. We're really not quite sure why New York proposed what it did. It frustrated just about everyone in the industry who wanted an out-of-competition testing rule.

I would tell you the Thoroughbred Horsemen wanted an out-of- competition testing rule as much as anybody else did. There was no dispute as to whether or not to do out-of-competition testing. You get that clash of public policy versus legal rights and the like. New York became the poster child for that. Now this was their rule. I'm still going through the proposed rule. I just highlighted for you some of the areas of concern. Andrew will go into that more extensively.

New York sought jurisdiction beyond its jurisdiction, off-track grounds, off-track property. They sought to look for drugs other than the gene and blood doping agents. We're not quite sure what they intended to look for but the language said, "Other drugs and substances" which took you potentially beyond the gene and blood doping agents, the peptides and the like.

Required anyone who was located within 100 miles of an NYRA track to submit to testing and bring their horse to a NYRA track for testing.

Anytime you see numbers in a rule, you have to be careful because it gets arbitrary. Why 100 miles? Why not 90 miles? Why not 110 miles? What was the point?

How do I go back? I need to go backwards. How do you go backwards? There we go.

The application for a license in New York constituted a grant of consent for access of racing and wagering personnel to your premises off the track: your farms, your home, your cars, who knows what. Why they were seeking to do that is beyond us. The rule was fatally flawed. We conferred with our colleagues in the Harness Industry.

Andrew Turro is just a terrific lawyer and who represents the Harness Industry began the litigation. We were gonna cooperate in the litigation. The Thoroughbred Horsemen took the position I think, to their credit that, "Why are we litigating this? We need to get an out-of-competition testing rule. Why not go to the Racing and Wagering Board? Why not see if we can't fix this rule to make it work?"

We engaged in the period of negotiation with the State Racing and Wagering Board that led to modifications of the rule. By the way the proposed rule that I referred to that Andrew will talk about, they went ahead and implemented it in the Harness Industries. A lot of those provisions that I pointed out to you that I think were fatally flawed remained in the Harness Rule. That's in litigation right now. That's what Andrew will talk about.

We engaged the Racing and Wagering Board. Quite frankly the Horsemen's position was, "We want out-of-competition testing to occur on the grounds of any New York racetrack. We want you to be able to do that. We want you looking for gene and blood doping agents.

You need to clarify that because there are stem cell therapies. There are platelet-rich therapies that are therapeutic that might fit under your definition of gene and blood doping agents but they don't have an analgesic effect.

They don't affect a horse's ability to compete. They don't affect performance. They're recognized therapies."

The Board agreed with that. We said, "Why don't you cooperate with commissions in other states? If we want someone or you want someone to be out-of-competition tested, then ask — and they're not under NYRA grounds.

They're in another state but they're gonna be coming into New York to race. Let's get cooperation among the racing commissions to do that. That's been somewhat of a problem.



We said, "You need to go, just like the Olympics does. You wanna drug somebody, you go to them and you drug test 'em. Don't make them come to you." Any number of things, split sample testing. We wanted the ability to have split sample testing. Racing and Wager Board agreed. Racing and Wagering Board had proposed a ten year suspension for someone in violation. We said, "Ten years? Revoke 'em. Throw 'em out of the business."

They took the ten year suspension out. Now it's, you're a violation it's a revocation of license. We said, "How do you know if someone — under the proposed rule, if you were anticipated to race in New York within a 180 days you were subject to testing. How do you know if you're gonna race within 180 days? A lot of horsemen make their decisions a week, two weeks, three weeks. How do you know if you're gonna race that horse in 180 days in New York? More importantly, how is the board gonna know that?"

Essentially the rule provides for a horse that's nominated to race in New York. You're dealing with your stakes horses which is I think what they're targeting. Those are the ones that are subject to testing.

Most importantly, we think we cleared the jurisdictional issue up. New York proposed the new rule. We had a letter exchange with them to clarify. There is a Thoroughbred Out-of-Competition Testing Program in New York.

The program's been going for at least three years. To the best of my knowledge, there has been absolutely no violation. No detection of the gene blood doping agents. I think that there are other jurisdictions doing it. They're strategies are a little different but I think the results are the same.

The NTRA code of standards has — wow it didn't come up on the slide well. Can you go back? I don't know why it's not coming up on the slide but it has an out-of-competition testing requirement.

I just wanted to show you that Kentucky has a rule that somewhat compliments the New York rule. There are other states — one state because of personnel issues and otherwise, rather than doing the typical out-of-competition testing, although they're doing it, is looking at TCO2 bloods that have been collected for TCO2 testing.

They're just spot checking these samples to see whether or not there are any gene or blood doping agents and the like in there. My understanding is in California, they have not been able to detect any gene and blood doping agents.

Where are we? Here are what I think the issues are with out-of-competition testing right now.

One, most jurisdictions don't have the personnel to do it. It's a financial issue. It's one that the Jockey Club, I think, was trying to target this summer and trying to

get its pilot program going. We need to get a more robust out-of-competition testing program going in racing.

One of the things that I think is gonna benefit us is this remarkable advance that we've made in drug testing and in laboratory accreditation over the past year.

The vast majority of the racing jurisdictions in this country, and I'm talking more than 26 jurisdictions, are now having their testing performed by an accredited laboratory. Probably by this time next year they will be RMTC code accredited which is the stiffest and toughest code of standards for drug testing of any sport in the world.

If you've been following what's been going on with the Mid-Atlantic Program that's now moving nationally, all these labs are moving into an accreditation program. The beauty is that we're gonna be able to use the accreditation program to enhance out-of-competition testing.

One of the concerns is, are the laboratories able to detect a lot of these emerging drugs? The answer is yes and no. We know what they are looking for and what they can find. We know there are emerging substances.

You can go on the internet right now and if you wanna Google peptide venoms, it'll take you to sites where you can buy and find commercially available peptide venoms that are therapeutically used in medicine and otherwise. They'll gravitate to racing and somebody's gonna figure out a way to use them and try to escape detection.

We need, through our laboratory testing program, the ability to detect these kinds of substances. That's more important, quite frankly, than testing for the 24 therapeutic drugs that we currently test for that are your drugs that are used every day. We've provided a safe harbor for them. They're not the drugs that are compromising racing.

We need to have a robust program that's gonna be looking for these emerging substances. We've been saying it for years. I guarantee you five or ten years from now, those are the drugs that you're really gonna be focusing on. Not Phenylbutazone and not Clenbuterol and these other substances that are used on a daily basis.

We need to be able to do it in a way that we're not just looking at the stakes races that are running this country. Because I think in the upper echelon of our sport — this is my own perception. That gene and blood doping is not going on at the higher echelons of our sport.

You can't say that when you have dermorphins situation in New Mexico and Louisiana. You know that some of the lesser ranks in our industry whether it's standard bred Thoroughbred, Quarter Horse that you don't think this kinda thing is going on.

Our program is not set up, quite frankly, to go after that. It's to go after the higher echelon. We need to do that.

Finally, Jockey Club had suggested this summer that we ought to expand our program to class one drugs and to anabolic steroids.

I would just say with respect to your class one drugs, yeah you can go through the list. You can probably find some class one drugs that you might want to add to this list for out-of-competition testing but the number of those drugs that are long acting far beyond detectability is relatively small.

There are drugs on the class one list that are gonna show up through contamination, feed stuff.

Our labs are able to find the class one drugs. We just this year had an Acetazolamide positives in West Virginia.

Class one drug, laboratory in Delaware detected it. I think that while we can look for certain drugs in the class one category, I don't think we need to do that for out-of-competition testing.

With respect to anabolic steroids, we've pretty much through our withdrawal times and shifting the use of those drugs so substantially prior to racing that most horsemen are not using them.

We've just recently eliminated the permitted use of Stanozolol. I think the one that the horsemen are probably using the most is Boldenone Equipoise.

They do it for horses that are coming off long layoffs, need to better appetites, get bulked up. We have sufficient withdrawal times to prohibit that. If the industry wants to add anabolic steroids to the list of out-of-competition testing drugs, that's gonna be a policy decision for the industry that it will have to discuss and it will have to make. That's what I think is the landscape on out-of-competition testing.

I'll let Andrew now — let Paul introduce him but Andrew Turro talk about the New York situation. He's gonna give you a really good looksee at this from a legal standpoint. Thank you.

**Mr. Paul Estok:** Thanks Alan. Next up we have Andrew Turro who, as Alan said an attorney from New York who actually has been litigating this out-of-competition testing issue. He's gonna tell us his experience with that.

**Mr. Andrew Turro:** Thank you Paul. To begin, I wanna just say I'm really honored to be with the people here on this panel. They are people who know a lot more about racing than I know. Certainly are people from time to time have had to go to, talk to and are always there if I have a question and if I need help. As a

lawyer who, as of about six years ago, knew nothing about horse racing, that comes in handy. I'm very appreciative of that.

I am a New York attorney. About a month or so ago, I received an email from Paul. He was putting together this panel. Paul said to me — talking about, "What are you gonna speak about?" We were going back and forth.

Paul's comments, he's, "Well, why don't you talk about — or I'm understanding you're gonna talk about why you think out-of-competition testing is a bad idea." Hence the title of the presentation.

I thought to myself and I said, "Well, that's not — I don't think I really wanna do that because it's really not the way I think." It's not the way that I think that many people who really care about horseracing think.

Four years ago, almost to this day, in December 2009 the day before Christmas Eve I received a phone call from one of my clients dealing with the New York's Racing Board's promulgation of the out-of-competition testing rules for harness racing. This is what Alan was referring to before.

Since then, pretty much for the next four years, this litigation has been just a roller-coaster ride.

Really just a case of a lifetime that rarely — I'd never seen anything like this. We've been able to address all types of issues, constitutional issues, legal issues.

Really have had some real active policy making decisions, negotiations that has been really just unprecedented for me anyway.

After I got that call, very quickly within a matter of two weeks we were in front of the New York State Supreme Court in New York County seeking to enjoin the promulgation and these rules from becoming law.

We were successful there. Thereafter our case was transferred up to Schenectady where the Racing Board's offices are in New York. We had hearings and papers that lasted well over from January 2010. The decision was issued in August of 2011. You have an idea of what we went through with evidence.

In that case, when push came to shove at the end of the day, the Supreme Court, Schenectady, struck down the entire statute as being unconstitutional and contrary to law.

Thereafter the Board appealed to the Third Department. The Third Department in its infinite wisdom, sarcastically in my view, overturned a good part of that but still held parts of those regulations to be unconstitutional.

The New York State Court of Appeals, the highest court in the state, has now given us the opportunity to have that case heard. Our briefs are all due between now

and March. The case will probably be heard sometime this spring or early summer before the Court of Appeals in Albany.

This case is really, for me personally and professionally, really presented a sea change.

I'm going to be talking today about out-of-competition. I'm gonna be talking today about the out-of-competition rules in New York. I understand there are many, many different jurisdictions.

The point of the presentation is to hopefully educate. Not necessarily advocate but educate as to what — when you have a set of regulations, what do you consider and consider in terms of is this a fair scheme? Is this a legal scheme? Is it something that should be challenged or not?

Because again, I don't think anyone here is going to challenge the wisdom of drug testing or out-of-competition drug testing or the goal. That is to preserve the integrity of horseracing and to maintain that.

I think at the same time every horsemen, every driver, every owner, every trainer is very much invested in making sure whatever regulations there are, are fair to everybody concerned.

To make sure that everybody has a legal and a level playing field do no one has an undue advantage. With my clicker, I'll hopefully be able to do this.

I wanna begin by — there we go — basically just going over the justification for out-of-competition drug testing rules which Alan touched upon. Again, the whole concept here is it's based on primarily a general premise that the efficacy period for certain performance enhancing in substances exceeds the detection period for those same substances.

That premise, in my estimation I think and probably everyone's estimation in this room, is unassailable. The validity however of using that premise to justify certain out-of-competition rules and agency conduct must be scrutinized.

When I was sitting here, I just wanna go back. I realized and I thought about something as Alan was speaking. Alan and I had many conversations early on when I was getting ready to bring this on behalf of the harness race owners and trainers. We had thought about bringing on behalf of both.

Ultimately and quite frankly, we, the harness people, we were engaged in extensive prolonged and protracted negotiations with the Racing and Wagering Board. Ultimately, we had to go to court.

As I told you, we were successful early on in the New York Supreme Court and again in Schenectady. I like to take some credit. I would like to think what happened in the Board and the agencies mind, when they saw that we were

challenging and we were successful, is I think they continued to refuse to negotiate with us at that point but at least I feel like we've already done some good.

Because to some extent at this time, it seems to me that the Thoroughbreds have benefited to some extent in that the Board finally was thinking about, "What are we doing here? Are we doing it the right way?" That's what this is all about.

I have one long quote. This is it. I promise there's not gonna be another one. I did want to go through it and make sure we all read through it because this is where it all comes from. In the out-of-competition — in the regulatory impact statement for New York.

I think this is going to be pretty true in almost any jurisdiction that you go to, the statement to justify reads as follows: "Despite advances in drug testing procedures and equipment, certain drugs and substances are still difficult, if not impossible to detect including certain blood doping agents and gene doping agents.

In the case of blood doping agents, the timeframe for detecting these substances is limited but the performance enhancing benefits of the agent remain with the horse long after the detection period has passed.

To evade testing an unscrupulous owner or trainer only needs to stable a horse off of the racetrack grounds, administer the doping agent and bring the horse to the track on the day of the race well after the time for detection has passed but well within the timeframe for enhancing the horse's performance."

That's the last long quote I'll read. First of all, it's hard to argue with that statement but you have to make sure as we go forward, and when you look at any out-of-competition testing regulations, you keep this statement in mind.

Make sure that the regulations really reflect and really further the intent of that statement and are not being used for some other purpose. I'm sorry, there. The fairness and legality of specific equine drug testing rules and not the wisdom of the testing in general should determine whether or not any schemes a good idea or a bad idea.

Because in my mind, no one in their right mind would question the wisdom of drug testing because that's really not the question here.

Again, I gave you by the way various materials. Those are the New York materials. They are the regulations I'm gonna speak about a little bit today, the legislation and the various opinions that have been issued in the case for and against the New York State Racing Board which is the case that I've been litigating over the last several years.

They really apply, the concepts apply, to any jurisdiction. With any jurisdiction, when you look at out-of-competition testing scheme, you have to realize that the

drug testing rules are generally going to be creatures of the state, a state agency, state legislature.

The regulations must be, number one, they've gotta be constitutional. They've gotta be consistent both with the state Constitution and the Federal Constitution.

They also must be consistent and conform to what's called the State Enabling Legislation. What the State Enabling Legislation means is the legislature has agencies all throughout the state. They have Department of State. They have Department of Labor, the Department of — they also have the Racing and Wagering Commission. What the legislatures do is they basically give power. They give power to the regulators.

The regulator's power is defined by the scope of the legislation. They cannot go beyond what they have been conferred under the legislation. That's an important thing to consider again when you're thinking about any out-of-competition testing in any jurisdiction. Secondly, number two there, is it's also has to have a rational basis. It cannot be arbitrary or capricious.

The legality, you have to safeguard constitutional rights. The agency has to be acting within their authority that's been given to them under the legislature. It can't be arbitrary and capricious. That's another way of saying, it's really gotta be fair to everybody. Now there are certain constitutional issues that are routinely implicated with you look at any regulatory scheme especially one that's invasive. They have to really be considered. The really three different things that have to be considered with respect to constitutional issues that may come up.

The first one is in the area of racing, the United States Supreme Court in the case of Barry against Barchi held that an owner, driver, trainer's license is a protectable property interest.

What does that mean to the non-lawyers out there? That means that that property interest is protected by the Constitution and cannot be taken away without due process of law. You're entitled to fair procedure.

Number two, the Fourth Amendment, any kind of regulatory scheme that deals with searches and seizures as in New York Regulatory Scheme does. I'll talk about that a little bit later.

They have to consider not only — first of all the individual's right to be protected against unreasonable searches and seizures by the state. Also what's very important is many regulatory schemes including the Racing Board Scheme contemplates warrantless searches and seizure.

In other words, you don't have to go to a court. You don't have to have any kind of — you don't have to go to court to get a warrant saying you have a sufficient factual predicate to search. They have administrative searches. Administrative searches, in a regulatory scheme, whatever jurisdiction you're in again, is subject

to certain requirements. That's to make sure that there's not abuse of power on the state level.

The third concept is something known as the separation of powers. Each one of us can think back to our high school, junior high school history class. I think they still teach this.

With the notion and the concept of checks and balances because we have three different branches of government. We have the executive branch. We have the legislative branch. We have the judicial branch.

Under the separation of powers stuff, you know the Constitution, this is a concept that's in both every state and Federal Constitution in the United States.

The separate branches of government cannot interfere or encroach upon or exercise the power of the other branches.

Again, in our case, the executive is going to be the racing agency that's doing the enforcement of the regulations.

The legislatures is the one who passes the law to give power to the agencies. Of course what's always there is the constitutional considerations.

These are three things that you just have to keep in mind when you're looking at and trying to assess whether or not an out-of-competition regulatory scheme comports with the law or not.

Now, a State Enabling Legislation will typically define, as I said before, the permissible scope of what a state agency can do. I'm just gonna use New York to illustrate the point. Again, if you're looking at Kentucky or if you're looking at Indiana, this is an important thing you have to look at.

You have to look at, "Well where is this agency getting its power to do what they say they're doing and what they wanna do? Are they doing it within the power of the legislature has given to them?"

In New York there are three pieces of enabling legislation that the Board itself cites when they promulgated the rules.

The first one is the general rule 101 in which the legislature gives the state, to the state agency of the Racing Board, general blanket jurisdiction to govern or have general jurisdiction over all horseracing activities and betting activities. It says, "Both on and off-track." That's subject to some debate because on and off-track, if you'd read the legislative materials, pretty much involves only the betting. It's only talked in the context of betting.

Now it has been used also to cover out-of-competition. That's just a general blanket authority. Then they're much more specific in Racing Law 3012A.



That's the second statute here. This is what Alan had referred to before and raised some questions about. This legislation authorizes the Board to regulate and to test for the administration of drugs and stimulants. The important language is bolded there, "For the purpose of affecting the speed of harness horses in races in which they are about to participate." The key language here is "about to participate in."

The third legislation is Section 902 which is the only legislation in which the legislature actually addressed actual testing. In fact, until four years ago with the advent of out-of-competition testing, it was the only testing that was done in harness racing. That is racing at race meetings. The horses tested before the race. Horses tested after the race so 902 is there. Again, allows and the legislature clearly contemplated this kind of testing.

Now, in turning to the actual out-of-competition rules, the critical threshold issue — this is something that Alan also talked about. I wanna address a little bit further with a little bit different spin, is what has to be banned.

What are you trying to ban here? What is the agency trying to ban? To determine the validity of those rules, you have to focus on the drugs first. You have to focus on the substances. You have to ask yourself — and in a legal sense, number one, "Do the rules provide clear guidance to the horsemen as to what is prohibited and what isn't prohibited?"

Number two, you have to remember this ain't always easy. It wasn't in New York. Again, all jurisdictions have to be judged on their own merits by their own definitions. They're gonna rise or fall on their own merits.

In this case again for—to illustrate because this is a case I've been living with for several years now, I'm gonna focus on New York and take you through that.

In New York, the out-of-competition testing rules ban the following three categories of substances.

Subdivision one was all blood doping agents pretty much. Subdivision two was all gene doping agents.

Subdivision three was very interesting.

Subdivision three was all protein and peptide based drugs including toxins and venoms.

What I wanted to focus on, what we did focus on during the hearings and through every step of the way was it banned all protein and peptide based substances. It was a blanket ban.

This is really problematic in New York because New York Board has other regulations. New York Board has regulations which permit, and I think Alan alluded

to this with respect to many jurisdictions, the fact that there are certain drugs with recognized therapeutic value that are permitted to be used within certain window periods.

Section three's definition in this blanket ban is problematic when you look at it in the context of other regulations by the same New York State Racing Board.

The definition creates pragmatic issues because it includes substances and medications that have not only recognized therapeutic value but are actually protein and peptide drugs with such value and are in fact — other regulations allow them to be used within certain timeframes.

In fact during our litigation, we identified about a dozen of them. Three of them are right there. I'm not a scientist. Many of you might know these drugs better than I but three are this anti-toxin which in New York was allowed to be administered up to 24 hours prior to a race, the latter two, up to 48 hours before a race.

Those are under the same regulatory regulations not in the out-of-competition provision but in another provision, these substances are allowed to be used.

What do I do? I bring in a half dozen veterinarians to testify and asked them these questions.

Each one of them, to a man and to a woman in one case, testify, "I have no idea what I can do with respect to both of these regulations.

One regulation says I can use it up to 48 hours prior to a race. Another regulation says I can't use it at all." Again this is really important.

It clearly had and has a chilling effect on the vets. These are issues that are very, very important and critical in horseracing and to the vets and to the treatment of horses because each one of these substances also have recognized therapeutic value. In this case and what has happened is the courts, every court at this point in time — both the Supreme Court and the Appellate Division, everyone says, "This doesn't work.

You can't have this blanket ban while you still have other regulations which permit these bans because it provides no clear guidance." Basically what they did here is they created a clear issue.

They tried to defend it many different ways. It was clearly a problem in terms of what was being banned and what were the players supposed to do here? What were the vets supposed to do? What were the trainers supposed to do?

What also came out during the hearings was something very interesting. In New York we have and really the Board has the resources of one of the probably if not

the most renowned veterinarian running their program, one of the most. That's Dr. Maylin, formerly of Cornell and now of Morristown, New York.

He's a wonderful man. He's often on the other side of hearings that I deal with. Dr. Maylin, if nothing else, is a man who — he's an honorable man and will always tell you exactly what he feels and what he believes to be the truth.

During the testimony and during my questioning with Dr. Maylin and in the affidavits that he presented in support of the Board's position, he made it very clear. We're talk about the substances that were being banned and the problem with detecting these substances and how long the efficacy period was for these substances.

His testimony was very interesting. His testimony was that the — he said, "A matter of weeks if not longer. A matter of weeks if not longer." I take everything Dr. Maylin says. Again I cross-examine him but I take him at face value. What he didn't say was very important. What he didn't say was 180 days. What he didn't say was 6 months.

I just want you to keep that in the back of your mind as we go forward. That's also very important.

Again, in assessing whether or not a regulatory scheme is fair, is based in fact and is also legal, that's a very important thing to be considering as well.

That brings us to what horses to test under a regulatory scheme, an out-of-competition regulatory scheme.

That brings us to this 180 day period.

Again, to determine whether the rules are in fact legal or not, you have to look at whose being tested here. I quote here again what I read to you before, the enabling statute that limits the power to test horses by the agency.

It permits testing on any horse among those anticipated to compete at New York tracks within 180 days of testing or demand for testing.

The problems here are twofold. There we go. The about to participate language in the enabling legislation under 301, is hard to put — it doesn't really stand with the notion of a horse about to participate.

In the harness racing business, horses — now harness horse races pretty much from week to week. It's very difficult when you think about it. To test somebody today, and say, "Are they gonna be in a race within 180 days?"

This construction by the agency, what this language allows them to do under the regulations, is really — and under the regulations they're basically allowed to test anyone, any horse, who is anticipated to race for 180 days. It really provides them

with a carte blanche. They can really test any horse at any time for any reason and also anywhere in the world which we'll get to as well. There's not a single constraint. It's really wide open.

It certainly cannot really be read consistently with the notion and legislature directive allowing them and directing the board, "Yes, you can test and you can test.

You can test whether drugs are being administered to a horse in a race that's gonna affect their speed in the race they're about to participate in." Even when you take Dr. Maylin's testimony, maybe there is a period of time that's weeks and maybe different for every drug. Maybe there is a legitimate piece of time, a relevant time period. There was nothing to support 180 days.

We cross-examined. We presented proof that there was no proof. We begged for proof otherwise. We got nothing in return. It was really nothing more than speculative.

It was really nothing more than an agency trying to abrogate to itself a certain type of power that they're able to do. Maybe trying to do the right thing but in the process not paying attention to certain other important issues including people's constitutional rights.

There was no scientific or rationale basis to support the six month period. Ultimately, we argued and successfully argued before the Supreme Court both in New York and in Schenectady and the Appellate Division has now put this bear back into play.

We're gonna go back to the court of Appeals on this. The validity of the 180 day testing window because number one, it's inconsistent with what the legislature has — the powers that they've given to the agency which would basically not only be the excess of jurisdiction but goes back to that separation of powers doctrine I was talking to you about earlier.

It's also arbitrary and doesn't have any rational basis. There's no empirical evidence to support this six month period.

There are also some privacy issues that are very important that come up with respect to the regulations. Actually this again has to do with almost any regulation, any jurisdiction that has these rules. You have to look at these very carefully. In New York, it's rather unique.

Under the regulations, the New York Racing Board is allowed to conduct and demand the cooperation not only of the people who are licensed under the agency but people who are not licensed under the agency.

Also to impose sanctions upon not only licensees but non-licensees. These in New York, again — this is why you have to look at different jurisdictions. In New York significantly that means horse farm owners.

Unlike New Jersey and other jurisdictions, in New York horse farm owners. The owners of horse farms are not subject to the racing agencies jurisdiction. There is no license.

However, the Board's rules require — basically they contemplate going to horse farms. Requiring that the horse be placed in the stable on these horse farms that are not subject to the license and if there's any person who doesn't cooperate with them, they are subject to the Board's sanctions which include fines, which includes exclusions from the racetrack.

The compelled compliance of the out-of-competition testing rule basically authorizes the Board — what they're trying to do is authorize this Board to — that basically subjects licensees and non-licensees to warrantless searches.

Even when there are administrative searches that are the subject of an actual warrant, when an agency such as the Department of Health — there are several big federal cases dealing with an agency's, Department of Health, the United States Department of Health found in a federal level their right to go into mines and to inspect for safety reasons. "Oh, should go in to inspect for safety reasons." Basically go into private property but to inspect them for the benefit and the good of all.

Those searches are subject to very, very important limitations. It's not to restrict the agency but what it is, it's designed to keep the government from abusing power and abusing power while compromising the constitutional privacy rights of the individual.

What the courts have said, the Supreme Court and Federal Courts throughout the country have said is that, "You have to make sure if you're going to have these warrantless administrative searches, they have to be predictable. The industry has to know they're coming and when they're coming. They also have to be carefully limited in time, in place and in scope."

Here there are problems again with the rules. The predictability, as I mentioned before, there's not predictability in the New York rules.

Steve was speaking earlier and he was actually — I was interested. He was talking about the Canadian rule. He was talking about the need to have some kind of objective reasonable grounds before the horse, under the Canadian scheme, can be subject to an out-of-competition testing.

Here in New York, there is no factual predicate. All there is, is this illusionary timeframe that a horse is anticipated to race within 180 days which effectively

allows the Board to choose any horse without limitation or any factual predicate. Number two, the time of the search.

That's one of the places where it's supposed to be limited. In New York, there are no limitations with respect to the time of the search unlike other jurisdictions including Indiana, Kentucky and Illinois. Those have one or the other. They have either the time limitations and/or factual predicate and/or notice.

New York has none of that. No notice, no time limitations, and again on property of people who aren't even — they're not even licensed under the Board's jurisdiction. That's where the third location comes in. It permits unannounced warrantless testing of any horse under the control of licensed trainers whether located at a racetrack or stabled elsewhere. No safeguards to protect their privacy interests.

It's a point that has to be emphasized here cuz I'm gonna jump to my last point in a minute. Effectively, this rule allows the Board to go anywhere they want to in the world to test a horse which they anticipate to be racing in a New York track within 180 days but which they don't have to provide any basis for. No factual predicate for.

Which as a practical matter is unrealistic because a harness horserace owner doesn't know if one of his horses is gonna race 180 days down the road in a certain race.

As I said, they really go week to week and it would make —again, does it have to be a period? Does it make sense to have some kind of a period of time?

Yes but it's gotta be based in fact. It's gotta be based in science. It's gotta be based in practice. It fails on all counts here.

Finally, and the last piece of the legislation I'd like to just point you to. It's a very interesting piece. It's not anywhere else, in any other jurisdiction that I have found. Actually Alan mentioned this before.

It's this 100 mile rule which authorized the Board to compel a horse who's stabled out of state but within 100 miles of a racetrack to be returned to the state for testing.

This rule has a lot of problems as far as I'm concerned.

Number one, it allows the Board to basically mandate conduct not only out of state but out of country.

It allows them to go to Canada and say, "You gotta bring this horse back." What folds into that, it really gives the Board greater powers of compulsion than the subpoena powers of any of the New York state courts.

They've given themselves basically a power to compel like a subpoena power that the legislature has not seen fit to give the New York state courts. It may be that the legislature says, "We can't do that."

Finally, the 100 mile distance, it's interesting. Alan had mentioned he was asking, "What was the point of the 100 mile distance? Why not 90?"

Well, I of course had the advantage of going — of having this case heard over a period of months. The answer was, "We have to draw lines somewhere." Again, that's almost a definition of what arbitrary is. That's exactly what the Supreme Court found. Again, we're gonna be fighting in the Court of Appeals.

That was the basis, "A line has to be drawn somewhere." One point that we tried to make if you're really trying — what you're doing here by creating a 100 mile limit is then you can have a horse farmer.

They're going to strategically make sure their horse farms are 101 miles away from a racetrack so that you can't get 'em, if somebody really wanted to be an unscrupulous person in the racing industry. You're not gonna defeat it that way.

In any event, just to wrap up here, I just wanna finish up by again I wanna begin where I started.

Neither I nor do I think anyone can really seriously question the wisdom of equine drug testing including out-of-competition testing.

It's important and again in any jurisdiction because New York is one of the few jurisdictions that we've had active litigation challenges.

If there is a scheme there and you need to — the first thing you need to do is, is it legal? In doing that, four considerations, one, is what the agency doing, is it within their jurisdiction to do it? Is it within the powers that the legislature has given them?

Two, does the legislation provide safeguards for individual privacy, constitutional rights?

Three, do the rules and the regulations have a reasonable or rational basis?

Four, and probably most importantly, not to diminish the importance of the Constitution or anything else cuz they're all there I think supporting this concept, is it's gotta be fair to everybody.

Does the scheme, do the regulations ensure that it's going to be fair to all? Or can it be used to some ulterior motive that is not fair to all?

Thank you again for having me. It's a pleasure being here. If you have any questions, I'm happy to answer. Thank you.

**Mr. Paul Estok:** Thanks Andrew. The program will be making those handouts available, if you don't have them already, online. Now, I'd like to introduce Madeline Auerbach

**[laughter]**

**Ms. Madeline Auerbach:** Take two.

**Mr. Paul Estok:** Yeah, take two. She's well, we already said where she's from.

**Ms. Madeline Auerbach:** I'll say again when I get up there. Thank you. Well good morning everybody. Let me start with I'm not a lawyer, okay.

**[Laughter]**

I'm just a horse owner and breeder and all of those things. My perspective is completely different from anyone else that you've heard so far this morning. Please indulge me to share with you why I'm here and how it relates to regulating our industry and why this is extremely important for all of us.

About 2007, 2008 I became personally aware of the problems in racing as related to Eight Belles and many other things and the scrutiny that we are under as an industry.

My remarks are about regulation in the terminology that there are a lot of us who do not want the Federal Government to come in and tell us what we have to do in terms of retired Thoroughbreds.

Now if we listened carefully to our last several speakers we can see how well government does everything. We would like them to stay out of our business and not make it necessary for them to come in and tell us what to do because what needs to be done is the right thing.

It's something that the industry has struggled with for many years. We have not done the right things.

We are trying now to change what has been an industry's poor performance in taking care of our retired athletes. If you listened to everybody today, you hardly heard anything about the horse.

My remarks are about the horse, about the equine athlete, about the reason we're here and about the responsibility that we have. I am not discussing charity today. I am not talking about holding giant fundraisers. I am talking about responsibility.

We utilize these animals, these gorgeous, magnificent animals who run for us and for our benefit and for our enjoyment. I am talking about our responsibility.



Let me backtrack a little bit. In 2008 we started something called CARMA. That is the California Retirement Management Account.

In California we were fortunate enough to convince our racing authority to let us do the right thing. We took a portion of owner's purses, very small portion, three-tenths of one percent, and assigned it to aftercare priorities. That led us to forming an organization which is CARMA, which is a funding organization.

We decided the proper way to distribute this money was to have 501c3 charities applied to us for funding.

We took their applications. We took all of their information. We added a component that really hasn't been done before and that is site visits. We decided if we're going to give these people money, we're going to send somebody out to where they are and look at what they did.

Flip the lips of the horses that they told us that they had and make sure that the money that we were funded by the people of California from the purse account went where it was supposed to go.

Now we did this without a government telling us what to do. We did this without anyone giving us regulations.

This is a grassroots situation that we really feel the entire country has to be part of. Let's fast-forward a little bit to about two and a half years ago and a group of meetings that were held industry-wide that included New York, California, Kentucky and Florida and everybody. The Thoroughbred Aftercare Alliance was born. I'm very proud to be a part of it.

What the Thoroughbred Aftercare Alliance is going to attempt to do is take a very small portion from every segment of our industry and use that small portion wisely to support these horses when they leave the racetrack.

Now we all know some of them go for breeding. Some of them go for various other uses. Too many of them fall through the cracks. I am here to suggest to you today that if we don't find a way to take care of these Thoroughbreds the Federal Government will impose a way for us to take care of it.

In terms of regulation, I think we need to be self-regulating. I think that most of us would agree, we'd rather do it ourselves than have someone else try to help us figure out what to do.

Let me put on my glasses now cuz there are a few things that I really want to share with you.

When we were trying to form the Thoroughbred Aftercare Alliance, there were three groups that were key in helping us: the Jockey Club, the Breeders' Cup and Keeneland. Each of those groups gave us \$100,000 seed money. This was the

money that we used to begin our organization to try to put things in place that made sense. We took a lot of things of what CARMA has started.

We decided on a code of standards which we fought about for six or eight months. Then we took those code of standards and we presented them to the AAEP and had them go through them and had them put their stamp of approval on our code of standards.

Then we took our code of standards and went to the AAHA and spent countless hours in discussion of refining these goals that we had. We have the AAHA's stamp of approval. We took two very highly recognized groups and had them buy into our concept.

Then we decided to go after the accreditation. I can tell you that I can speak for each of the 23 groups that we have accredited, that those folks went through some very rigorous times. This was not an easy process.

It's one that I think that every group that applied to us for funding at some point thought they were just gonna give up and not even try because it's that rigorous. Because we under that this is not our money and this our fiduciary responsibility to go to groups that will utilize this money carefully.

I can't stress upon you enough how rigorous this was. This morning, fortunately we have some people from these groups who, if you would like to ask them what they had to go through, the hoops they had to jump through to get this accreditation and got it done.

Now the groups that we're looking for funding for include but aren't limited to stallion owners, farms, breeders, sales companies, sales representatives, tracks, truckers, vets, suppliers and yes the media; all of you and the gambler.

Everybody who benefits from these horses has a shared responsibility in our community. This is what we believe and this is what we are going to make happen. We are going to take care of our horses.

I hate to put out names because everybody has worked incredibly hard. As I'm telling you, it's been two and a half years to get here. I can hardly believe that we actually got here. I'm very grateful that we have.

Jack Wolf, who is our president, has been our visionary. He has been the one that has kept us focused on what the goal was, held us together when all of us wanted to quit. Jack deserves amazing credit for what he's put forward.

I'd also like to specifically talk about Jim Gagliano of the Jockey Club, Craig Fravel from Breeders' Cup, Bill Thomason and it was Nick Nicholson from Keeneland who each put up the money. They said, "Okay, you really think you can do this. Here's the money." I'm like, "Okay, we're gonna do it."

It became real at that point that we know we had the major players. There are just two other names I'm gonna throw out there, Mike Ziegler who was our Executive Director until we have finally hired a new Executive Director whom I wish to introduce a little later and Stacie Clark Rogers.

Without those people, I wouldn't be standing here. We wouldn't be doing this. I wanna thank them from the bottom of my heart for where we are today. Here we are. I am going to announce the names of the 23 accredited groups, just to tell you who they are.

Then we're gonna have a little presentation, if you call a million dollars little, then good. We're giving them a million dollars. We're announcing that today. We're extremely proud of what we've done.

**[Clapping]**

Thank you.

By the way I'm throwing out a challenge there to all these groups. Next year I want this to be five million. Let's keep that in mind.

The accredited groups so far are: Akindale Thoroughbred Rescue in Pawling, New York; Angel Acres Horse Haven Rescue in Glenville, Pennsylvania; Canter California in Los Gatos, California; Canter Ohio in Mentor, Ohio; Equine Encore in Tucson, Arizona; Florida Thoroughbred Retirement and — boy I didn't even know you had that name — Florida Track in Palm City, Florida; Glen Ellen Vocational Academy in Glen Ellen, California; Humanity For Horses in Mt Shasta, California; Kentucky Equine Humane Center in Lexington, Kentucky; LongRun Thoroughbred Retirement Society in Toronto, Canada; MidAtlantic Horse Rescue in Chesapeake City, Maryland; Mitchell Farm Equine Retirement in Salem, Connecticut; Neigh Savers Foundation in Walnut Creek, California; New Stride Thoroughbred Adoption Society in Surrey, British Columbia Canada; New Vocations in Marysville, Ohio; Old Friends in Georgetown, Kentucky; ReRun in Virginia Beach, Virginia; Southern California Thoroughbred Rescue in Norco, California; the Exceller Fund in Lexington, Kentucky; Thoroughbred Placement Resources in Upper Marlboro, Maryland; Tijuana River Valley Animal Rescue in San Diego, California; Trott USA in Laguna Hills, California; and United Pegasus Foundation in Tehachapi, California.

While I thank certain people, the people that I wanna thank the most are the people who work and run and volunteer and believe in the 23 rescue organizations that I have just pointed out to you.

They're the ones that deserve the credit. They're the ones that this is all about. They're the ones that, as an industry, we should respect and be grateful for.

Having said that, I would like to now, with everybody's indulgence, present a check for a million dollars.

I would like to be joined up here please by James Hastie who is the new Executive Director of the Thoroughbred Aftercare Alliance. Stacie Clark Rogers who is one of our premier board members.

I would also like to welcome, if I can find the right sheet — here we go: Christine Carroll from Florida Track, Michael Blowen from Old Friends, Mandy Minger from New Vocations, and Patti Shirley from Equine Encore.

We want you to see we're of course very interested if we could actually take this to a bank and get them to cash it. Would you guys come up here so we can all see you, please?

This is James Hastie our new Executive Director. He just came on board; Patti Shirley; Mandy Minger; Christine; Stacie; Michael; and uh-oh. I forgot somebody's name. Shame on me.

**Ms. Tannis Salant:** Tannis Salant with Glen Ellen Vocational Academy.

**Ms. Madeline Auerbach:** Oh, thank you so much. From Glen Ellen. Your first name?

**Ms. Tannis Salant:** Tannis.

**Ms. Tannis Salant:** Tannis.

**Ms. Madeline Auerbach:** Tannis. Thank you ladies and gentlemen. Thank you.

**Mr. Paul Estok:** Thanks Madeline.

**Ms. Madeline Auerbach:** Thank you. We're gonna go over there and take some pictures if you guys don't mind.

**Male Voice:** Thanks for your support everyone.

**Mr. Paul Estok:** All right, while they're gonna go over and take some photos I guess, I'm gonna throw this back to Jen Durenberger who has a few comments she'd like to make.

**Dr. Jen Durenberger:** Thank you.

**Mr. Paul Estok:** Is your microphone on?

**Dr. Jen Durenberger:** Thank you for giving me the opportunity to redeem myself. What I'm gonna do is, I'm gonna keep this very brief.

This was incredible what just happened here on stage. I hope you all recognize the significance of it. I am now going to put on my summarizer hat. I think what we

need to do is just reflect for a minute on what we've heard from all of our panelists today.

To think about what is our goal here? My goal as a regulator is to protect racings participants and the interest of our pari-mutuel customers.

Why is that an important goal? I think everyone in this room — this industry, recognizes how important this industry is. This is a great industry.

In addition to the economic contributions to our country, this is an industry that people get involved in on a lifelong basis.

For the students in the room, some of you are third and fourth generation horsemen whose family members were smart enough to tell you that a degree and the networking that you get in this program was a really important adjunct to what you've learned over the course of your life.

Other students have come to this program and this industry and they're new to it.

I hope that this is an introduction to what will become a lifelong career for you.

An example of this at Suffolk Downs this year, I had two employees that we brought on that had never set foot on a racetrack before. They came to us. We put them to work in the test barn with the very glamorous job of collecting horse urine after the race. Fell in love with this industry to the point where they went to Florida for the winter. They're gonna be working in Tampa.

We talk about the infection of this industry. That's how great this industry is. We bring two people in. We introduce them to the least glamorous side of this industry. They're gonna make a lifelong career out of it and 25 years from now they might be sitting here addressing this group cuz that's how I started in this industry.

I think my summary is going to be, what do we do as an industry to make sure that we all get to continue to participate in it and that the industry can continue all of the things that it has to offer?

I think it's very simple. We look at it in Massachusetts as the trifecta. The trifecta are safety initiatives. The safety initiatives begin at the racetrack. The safety initiatives also begin with the regulator and a partnership between the two of them.

The second part of the trifecta is sensible, enforceable regulation as we've heard from these two gentlemen. We need to have sensible regulations. We need to have them be enforceable. We need to be able to communicate them to the participants so that they can play by the rules.

The third piece, as we've just seen, is the commitment to aftercare. This industry needs to be committed to aftercare.

I appreciate you giving me the opportunity to redeem myself. I hope that that was my attempt to keep it simple. Also bring us back to why we're here.

The subtitle of this panel is ensuring that there continues to be racing to regulate. Let's face it.

Our industry is under challenge from a number of different areas. Until we strengthen the legs that are in that stool, that trifecta, those three pieces, we continue to be in jeopardy.

I guess that would be my attempt at redemption and bringing it back to the moderator and the whole purpose for this panel.

**Mr. Paul Estok:** Well thank you. I think we're right on schedule. Are there any questions from the audience? Anybody have anything they'd like to ask any of our panelists? I had one question for Jen actually. I know that the Racing Commissions was folded into the Gaming Commission in Massachusetts with a whole lotta people that don't know anything about racing.

How has that been? Getting that up and running and functioning?

**Dr. Jen Durenberger:** The background to Paul's question.

The Massachusetts' State Racing Commission ceased to exist on December 31<sup>st</sup> of last year. As a function of the expanded Gaming Act which is going to permit casino gaming in Massachusetts, if the people so desire.

Part of that enabling legislation created a Racing Division within the Gaming Commission. We're not the first merge agency. New York is just going through that right now.

It is challenging Mr. Moderator. Let's see. I have four full-time staff including myself in the Racing Division to 30 something full-time staff on the gaming side.

There are no operating casinos in Massachusetts. It is a group of fantastic, articulate, thoughtful, intellectually curious commissioners.

What I do is I basically just keep racing relevant for them.

I pick topics. I go around door to door and I talk to them about them. This is why our industry is great. I'll pick a trade publication story. I'll copy them on it.

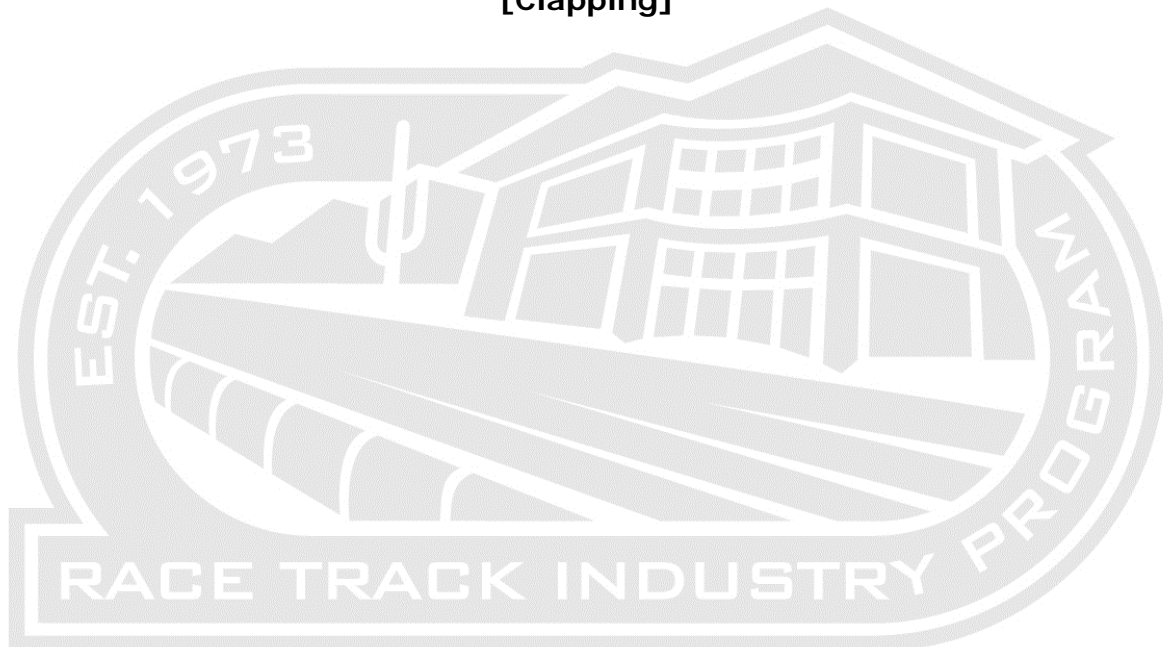
I'll say, "I'm gonna be coming by your office tomorrow. Let's talk about it. Let's talk about why this is an important issue. Why it surfaced in the media. What we're doing if it's a problem story."

This is the story that we have to tell. This is how we respond. This is our structure. I've just basically introduced them the same way that we introduced the test barn employees.

The enthusiasm and showing them what great people work in our industry. They have really become quite fond of racing as I heard my chairman say at a meeting the other day. I think that's a success story.

**Mr. Paul Estok:** Any other questions? Well, I'd like to thank all our panelists for their contributions this morning. I think we learned a lot. I know I did. I hope you'll join me in thanking them.

**[Clapping]**



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