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Who's Big Brother? Federal/State Regulation Alternatives

Moderator:

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Speakers:

Fred Pope

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MR. STEVE BARHAM: Okay, if everybody could come in and sit down we'll get started. We're running a little late as a result of the panel before this one and a good healthy dialog, and luckily the last person to have a comment was our moderator of this panel.

First of all, I'd like to thank the sponsors for this panel, Del Mar Thoroughbred Club and our breakfast sponsor. Also, not on the slide, the refreshment break that you got run into and out of is by Delaware North Companies.

Last panel was talking about wagering integrity and gatekeeping and all of those things; this panel is dealing with "Who's Big Brother?" The congressional hearings this summer gave the faculty an idea that maybe we should have this panel, and to moderate it is Ed Martin. Ed is the president of RCI, has been for a number of years. Prior to that he was the executive director of New York Racing and Wagering Board, so rather than me stand up here and talk I'm just going to turn it over to Ed and go with that.

MR. ED MARTIN: Thank you, Steve. Thanks for the opportunity to moderate this panel. We've got three very interesting speakers who hopefully are going to share some comments and give you some food for thought. Of course, they entitled this

Big Brother, and all you have to do is pick up the trades on any given day and try and figure out who the heck big brother is, is it the NTRA Safety Alliance, is it The Jockey Club, is it Graded Stakes Committee, is it Congress, is it the TRPB or the TRA, is it the state racing commission? I'm pretty certain it's not RCI, but if it is I wish somebody would tell me.

We've heard a lot, especially yesterday in some of the seminars about Mr. Chavez; Jonathan Chavez got up and talked about the need for this industry to self-regulate itself and I would echo some of that. I wouldn't use the word self-regulate, I would use the word self-police, especially on health and welfare issues. We can't legislate morality. I remember that was something that was said at an HBPA conference over the summer when we were talking about some of the responsibilities of the trainers and the owners and the horsemen to care for the animals, our wonderful equine athletes in their care, ethically and morally and not just be looking at winning the next race and hitting the exacta.

Self-regulation is not going to be a reality for this sport because of the gambling. I don't think there's an elected official either in Canada, the United States or anywhere in the Virgin Islands who's going to say, You want to run a gambling enterprise, go ahead, police yourself, regulate yourself, do whatever the heck you want.

That's not going to happen and those that stand up and argue for that, it might be interesting to listen to and they might say something appealing to somebody who might be a little upset with their state racing commission or their provincial racing commission or whatnot, but the regulatory scheme that we have right now, in the United States, is state by state. In Alabama, for greyhound racing, it's county by county. The current regulatory scheme was created at a time when, well, you had the local track, you had the local horsemen, you didn't have interstate simulcasting, everybody just went over to the track and did all their betting on-track. So it's not an unrealistic endeavor to reexamine this from time to time and say what's working, what's not working, what can we do better, are there things that we can be doing that might make us more effective?

I do want to note that the 800-pound gorilla in the room is always funding, and as this industry is experiencing economic hardship, so are the governmental entities that fund the state racing commissions. And the reality of managing a state racing commission is you do the best you can with the resources you are given. I ran into a guy last night, I won't mention his name, but he represented the horsemen in a prominent state that brought in slots and the state racing commission, I think I talked about it earlier in one of the other panels, which, I'll tell you, was Pennsylvania, and they opened three new tracks, created all sorts of new racing opportunities and the state racing commission didn't get a dime to hire a steward to judge the races or conduct even one drug test. So they had to do the best they could with what they had. In this conversation last night, he said, you know, so and so was there and he was our guy and he should have gotten us money from that legislation.

They were talking about one of the officials, one of the employees of the state racing commission. Well, in case you don't know, the problem with being an executive director of a state racing commission is, you know in your heart what you need to do to get the job you're supposed to do done, but the reality sometimes of the people you work for is they may need that money to care for the elderly or to educate the kids or to fill the potholes or to deal with a deficit because there's a lot of people unemployed right now. The racing industry, collectively, has not really stood up and adequately and aggressively supported its state racing commissions through budget times. There are all sorts of consortiums and task forces that say we should do this, we should do that, we should do this. In some cases, the industry has formed partnerships with the racing commission. I know in New York there's some drug testing that's going on that might not have been going on if there hadn't been a partnership between NYRA and the New York Racing and Wagering Board. In Ontario, there was a fund that was created, funded by the industry that has enabled them to have an increased backstretch security presence as well as conduct some out-of-competition testing. Boy, wouldn't it be great if we could get a public/private partnership to achieve wagering security?

So we're going to talk about what's working, what's not working, and we've got some great people here to kind of get into it. I do want to share with you something that was handed down to me this morning. I don't know how many of you get to read Indian Charlie, but the headline is "The NTRA is going to save us," and it says, "Praise the lord, the NTRA's going to save us from ourselves. They've just announced the hiring of former governor Tommy Thompson to head the NTRA Safety & Integrity Alliance. According to a high-ranking informant who wishes to remain nameless, they first wanted to hire Arnold Schwarzenegger or Jesse Ventura, but with the NTRA's new steroid policy, they didn't have the testosterone to pull the trigger in either case. If the NTRA wanted to really help the sport, they would mandate that all racetracks close their betting windows at post time, then load the horses in, virtually eliminating any possibility that bets could be made on Internet Web sites after post time which many people feel may now be the case. But instead, we get whips that don't work and flat shoes."

A lot of issues here.

Fred Pope is our first speaker. He's the president of the Pope Advertising Agency. He's based in Lexington, Kentucky. He specialized in thoroughbred industry matters for the past 25 years. He's represented major horse farms in Kentucky as well as the American Horse Council, the Florida Thoroughbred Breeders and the New York Thoroughbred Development Fund. Fred's agency did the start-up of the Kentucky Horse Park and the Breeders' Cup. In the mid-1990s, Fred created the National Thoroughbred Association, a major league for the sport of thoroughbred racing. He's a frequent contributor to the Thoroughbred Times, Thoroughbred Daily News, The Blood-Horse on matters of marketing for thoroughbred racing. He has strong opinions. He's willing to say them. And we welcome Fred Pope.

MR. FRED POPE: Thank you, Ed, it's a pleasure to be here. I'm filling in for Arthur Hancock who got sick and couldn't come. I'm sorry for those of you who wanted to hear Arthur, he has great passion and cares a lot about thoroughbred racing and breeding. I'm not going to deliver the speech that Arthur was going to deliver, but we are going to talk about government and thoroughbred racing. The last time that Arthur was here, he gave a speech titled "Drugs and Thugs." It called for the federal government to get involved and clean up our sport. Afterwards, even some of his close friends said, Arthur, the last thing we need is government involvement in thoroughbred racing.

So let's start off today with a show of hands, and I'd like for you to be honest. How many of you feel that government ought to be involved in thoroughbred racing?

Well, based upon your response, perhaps we should work to get government out of thoroughbred racing.

First, let's tell government we want them to take back the laws that make it legal to bet on racing. Why should government intrude and force our sport to have a monopoly on legal wagering?

Next, let's ask Jay Hickey there, when he returns to Washington, if he'll get government to rescind the Interstate Horseracing Act. Why did government feel the need to give our host tracks expanded distribution across state lines? And third, for good measure, let's tell government that we don't want the exemption they gave us in 2000 from the law that prohibits gambling on the Internet. Those three things ought to do it. We ought to get government straight out of racing.

The truth of the matter, ladies and gentlemen, is racing is more involved with government than any other sport. Government involvement is at the core of racing's existence. If it weren't for government involvement in racing, the only place we'd enjoy our sport is at a county fair.

I understand why most of you this morning didn't raise your hand. Government involvement comes with strings, doesn't it? There's a yin and a yang to government and politics. It seems when government steps in and passes a law to do one thing, it inadvertently results in doing something else. That's why I'm here today, to talk about how government's gift of the Interstate Horseracing Act has inadvertently resulted in an upside-down business model that's killing thoroughbred racing.

We are painfully aware that our once-healthy American automakers are suddenly on the verge of collapse because they have failed to take action and correct their business model. Now, talking about off-track betting and simulcast distribution models isn't a very sexy subject and it causes a lot of people's eyes to glaze over, however, that's where 90 percent of all the money in racing is today. If those of you sitting out there want a future in racing or breeding, you need to

understand where the money from off-track wagering is going now and where it needs to be going.

Here's how wagering under the Interstate Horseracing Act should have worked. The regulated host track and their partner racehorse owners that put on the show would have licensed and paid a small commission to people taking off-track bets on their product. For example, if someone bet \$100, the host track and purse account would get about 15 percent and perhaps pay a five percent commission to those taking the bets. That's the model used by the lotteries. Lotteries pay a five-percent commission to the convenience stores and gas stations punching in the numbers on the lottery bets. It's a very straightforward distribution model. The lotteries and the Interstate Horseracing Act kicked in about the same time, but last year the lotteries grossed \$50 billion and paid out about \$2.5 billion to their bet-taking partners. That's a pretty good business model for everyone involved. Racing could have taken a similar path. Instead, racing invented its own model. So now here's how wagering works under the IHA: The host track and the racehorse owners putting on the show contract and receive only three percent from the people that take in the bets on their product. The bet-takers keep 15 percent or more for just that, taking the bet. Whether the bet-takers are other racetracks or OTBs or ADWs or casinos, they keep the majority of the takeout on the host track and racehorse owners' live racing product. Why? The short answer is because the bet-takers felt that they owned their betting customers. If the bettor was going to wager on other track's races, the bet-taker was going to get the lion's share.

Today bettors can pick up the phone or go online and bypass the fixed locations of the bet-takers. The genie is out of the bottle and will never go back in again. The three percent going to the host track is split between the track and the purse accounts. Everybody understands that. What we don't understand is that it isn't enough to pay for the live show. But three percent is the going rate and it was established by the receiving racetracks taking the bets. Since the Interstate Horseracing Act has a provision that requires approval by the group representing the horsemen in the receiving state, the host track has no option but to accept the going rate of three percent. So if you bet \$100, only \$1.50 is going to the purses at the track putting on the live show, but more than \$15 stays with the place taking your bet. You might think the cumulative effect of three percent from lots of different sources totals more than the bet-takers receive, but it doesn't. If \$3 million is bet off-track, the host track and the purse account split three percent, \$45,000 each, while the off-track bet-takers keep \$450,000 or more, and many have no connection to racing.

This upside-down business model impacts 90 percent of the handle and it is the reason thoroughbred racing is dying in America. The bet-takers are gaming the IHA to the effect that there is no incentive for the host track to produce the live racing show. Just like American automakers, racing has to correct this model or risk total collapse. The potential closing of Hollywood Park is the new reality that no matter how large the market, a host track cannot overcome this upside-down

business model that is enabled by the wording in the IHA. Correct the IHA and American racing will become the strongest program in the world.

The IHA was supposed to help racing, simply by expanding the distribution of the host track's product. That's all it was supposed to do. Racing was relatively healthy in 1978, and this new distribution should have seen the sport and business revenue explode. If we had used the normal distribution model, like the lotteries, racing too could have \$50 billion in handle. The good news is this is a problem that can be fixed. With the stroke of a pen, the promise of the Interstate Horseracing Act can be realized. We can turn the upside-down business model right-side up. Racing has a monopoly on wagering. We have virtually national distribution of a wagering product. We have a monopoly on Internet gambling. All we're missing is a real-world business model and that comes quickly by correcting the Interstate Horseracing Act. The American automakers' business model doesn't work because labor costs are too high, but even if a labor official knew the business was going to collapse, you can imagine how hard it would be to convince the members to go from \$70 an hour to \$40 an hour and the same in our business. Even if receiving track horsemen know the off-track business model means major tracks will fail, it would be hard for them to voluntarily give up making 15 percent as a bet-taker in order to save the host tracks. That's why it will take responsible people who have a national interest in racing to get involved, because you people will never agree to a haircut in the interest of the sport. That's the beauty of correcting the Interstate Horseracing Act. Without state by state turf battles, the national law will fix the problem. Racing's upside-down business model goes right-side up.

At a time when everything in racing and breeding is headed south, correcting IHA will see a billion dollars go to the host tracks in the first year. Half, \$500 million, would go into racehorse owners' purses at the host track.

So here's what we need to do to correct the Interstate Horseracing Act and have a normal business model for off-track wagering that will restore business to thoroughbred racing. First, change the term horsemen to racehorse owners. There's no reason for trainers to be making business decisions for racehorse owners. That should never have been written into the original legislation. Like in California, the HBPA should be funded for benevolent activities in every state.

Number two, eliminate the provision in the IHA requiring approval of horsemen in the receiving state taking the bet. This provision, while well-intentioned in 1978, is obsolete today and it is responsible for the upside-down business model that has evolved over the past 30 years. Approval by racehorse owners at the host track should remain in the IHA untouched.

And number three, mandate the host track and host purse account receive a minimum of 50 percent of the takeout on the interstate bet. This will allow the host track and receiving track taking the bet to share the same amount. All of the bet-takers, like ADWs and OTBs and casinos will need to contract with the host track and racehorse owners who approve the host track agreement for the IHA.

The Interstate Horseracing Act is a pure business distribution piece of legislation and these corrections that must be made are relatively minor. I do not favor using the IHA for any other purposes such as safety or issues of medication. There's a lot of people who have talked about that, but we need a business model and the IHA is a business distribution piece. Once this new business model for off-track wagering is a law, racetracks and racehorse owners putting on the show will have great incentive to package, present and, yes, finally promote their thoroughbred races. Under the new business model, the host track will be free to go direct to the betting customer in every racing state. Racing can be a leader in the new economy and take advantage of technology that can deliver the same business model we enjoy with on-track wagering.

Actually, I think you'd find that the transaction through ADWs can cost less than the current on-track model with the betting windows. The problem is today that the bettors standing in the paddock at the host track putting on the show can make a phone bet that results in very little money going to the host track and its purses. After these corrections to the IHA, it will not matter where the bettor happens to be at the moment, the majority of the money will go to the host track putting on the show. That means that even small tracks like Turfway Park or Tampa Bay Downs, if they put on a good day of racing and attract wagers of \$10 million, they could split up to \$2 million with the purse account. That's how you bring thoroughbred racing back. If you double those numbers, and there's every reason to believe that a good wagering product being distributed nationally has every opportunity to go up, double those numbers and all of a sudden you have casino-type numbers coming into these host tracks. And when racehorse owners start winning these purses, that's when the breeding business has a firm foundation for the future based upon, for the first time, racing performance. Every track in America will have the opportunity to provide their races to every wagering jurisdiction with no gatekeepers or middlemen siphoning off the fruits of their labor.

This philosophy of owning the bettor and giving the majority of the money to the entity taking the bet is a worldwide problem. We have the technology for live racing to be sold to a worldwide audience, yet because of protectionism and old-economy thinking, we do not have a business model to grow the live racing product. Everything today favors who takes the bet, not who produces the live show. Change that premise and you assure the international future of racing. The day of the franchise that values bet-taking is over. It has no place in the new economy. When racing's business model moves away from old-economy thinking of "we own the bettor," to a new economy realization that "we own the show," then our sport has a bright future.

Changing economies are frightening things. Particularly with the realization that if you don't change, you die. The new economy for racing, under a business model that favors those putting on the show, will bring innovation and opportunities that are unimaginable today. Nothing succeeds like a profit motive, and corrections to the IHA will bring solid incentives to package, present and promote its races. The unfair advantage that racing has been given time after time by government has never been realized because of the stranglehold bet-takers have over the sport. A

monopoly on gambling, with national distribution and a solid profit-margin is the Holy Grail of sports marketing. How we've screwed this up over the years is a crying shame.

Five years ago, I was hired by a racetrack company to do the most extensive consumer research ever done on thoroughbred racing. I reviewed the research done by the NTRA then set out to find more in-depth answers using a top research firm. I'm restricted from telling you the results, however, I can tell you this: The results did not support other entertainment or alternative gambling at the racetracks. The facilities are not the problem and they are not the solution. Scientific research is cold and its results can get you fired.

There's nothing wrong with thoroughbred racing that cannot be fixed by packaging and presenting a better racing product. The first step, though, is to change the business model to make it all possible. The Kentucky Derby and the Breeders' Cup have shown us the daily market for racing exceeds \$100 million. That's a good goal for host tracks to aspire to each week. This current ADW problem is a symptom of how upside-down our business model has become. ADWs need to be simple businesses that handle transactions, not companies trying to game the IHA with schemes and kickbacks called source market fees. When we correct the IHA, the ADWs will not be a problem; they'll be part of the solution. The real problem that must be solved is between the bet-takers and the host tracks and racehorse owners putting on the show. Everything else at this time is just noise.

We have the opportunity for a new golden age of thoroughbred racing. Those of you who might say that we should not risk correcting the Interstate Horseracing Act, I would say we cannot risk not correcting it. Do we, like the automakers, risk total collapse of our business because we're afraid to change and act? We cannot fail to correct the Interstate Horseracing Act. Thank you.

MR. MARTIN: Fred, thank you for a very thoughtful presentation. I know you've got everybody in the room hoping that we could enter a new golden age.

Jay Hickey is no stranger to anybody in this room. Jay has been the president of the American Horse Council since some of the Race Track Industry Program students — I'm sorry, I didn't mean to do that to you — since 1993. Jay is our voice, collectively, in Washington and he knows the ins and outs of the various corridors in which you must travel in order to get legislation through, avoid legislation from getting through, or trying to maneuver the myriad of federal agency and regulatory processes that we all are subject to.

Jay Hickey, welcome.

MR. JAY HICKEY: Thank you. I still can't get from Longworth to Cannon. I get lost down in those tunnels, so I don't know whether I know the ins and outs.

I want to thank Doug Reed and the University of Arizona for inviting me here to speak at the Symposium this year on big brother and the federal government and intervention or no intervention or whatever. As everybody knows, obviously, there's been some substantial changes in Washington that will start with the new Congress, new President, more Democrats in the House and Senate. That will have some effect, some changes. In terms of the Cabinet, the racing industry generally is interested in two positions, the attorney general, who I don't believe is part of the Cabinet actually, and the Department of Agriculture because of import/export. But we'll put that aside for a second. Clearly, the attorney general who deals with the federal wire statute and for our purposes today will be important, and Eric Holder is going to be the attorney general, and I don't know where he is on certain issues, but he's been at Justice before, even when we had our issues which we'll get to in a second.

The House picked up 25 seats, the Democrats did. The change that is about to happen is Henry Waxman, who is a congressman from California, challenged John Dingle, who was the chairman of the Energy and Commerce Committee, and that is the committee that has jurisdiction over changes to the Interstate Horseracing Act, the committee that had jurisdiction over the hearings in the last two Congresses. So Henry Waxman will be the chairman of Energy and Commerce in the coming committee. I don't believe he's taken a position on any legislation that we've dealt with but I would suspect that Henry Waxman is a little more sympathetic to regulation than John Dingle has been.

Our issues are not Democrat or Republican, they're bipartisan. Although, to the extent that the Democrats might be more inclined to regulate something as opposed to the Republicans, the more Democrats might have an effect on it. Why is that important? Because Congress has been looking at our industry for some time now. Specifically, there's been five hearings involving horse racing, not all of them specifically involving horse racing, but three on jockey's insurance and the situation with the Jockeys' Guild, which is thankfully over now, and then two in this last Congress on steroids and medication. So that's important that we know about that.

For those of you who think, my God, the country is in serious condition, we've got two wars and why would Congress bother to spend their time on horse racing, which is important to us but not necessarily Congress, I read that Congressman Joe Barton from Texas, who is the ranking Republican on the Energy and Commerce Committee introduced legislation yesterday, and I want to read this, "to prohibit and make it an unfair and deceptive practice to promote, market or advertise any post-season NCAA Division One football game as a national championship unless it has been a culmination of a equitable playoff system."

I should mention that Congressman Barton is from Texas A&M, and he is, as I say, the ranking member of that committee. Now, this could be sort of tongue-in-cheek since this Congress is over once they finish with the General Motors, Ford, although Ford says they don't need it, Chrysler bailout. Maybe we could go in and

get a bailout too, I don't know, maybe we'll do that next Congress. But it will be interesting to see whether he introduces that bill next year.

Just for your information, there was a hearing in 2005 on the BCS series and the President-elect has made a statement, so there is nothing that is too or not important enough for Congress to get their fingers into. Instead of dealing with BCS, personally — for those of you who might be bored and read bios, see where I went to college — I would prefer to have some sort of hearings on Notre Dame football and figure out what the hell's going on in South Bend these days and if there's some way to help, and I know that TOBA would support that effort. Those of you who know Dan Metzger, he's crazy about Notre Dame football for some reason.

As you know, following Eight Belles, Barbaro, George Washington, we've had a tough time in the press and in the media. There's been an awful lot of articles criticizing racing for medication, our breeding practices, almost all of it has been bad news. Newspapers, magazines, talk shows, even non-sports talk shows got into it in June and July, and many charges, most of them have been sensational and emotional and not necessarily factual. I'm not suggesting that we don't deserve it. We do. A lot of that criticism we brought on ourselves, but the point is that for our purposes, little of it was balanced or objective and most of it overlooked what the industry has been doing over the last five years in regard to safety measures, steroids, drug research and detection, injury reporting, track surfaces, etcetera. There has been an awful lot of activity within the industry to try to deal with these problems. Many of the reforms that you'll hear about later today and that you already know about were undertaken well before the Triple Crown last year.

But this panel is about Washington, Congress and federal legislation and I want to read to you some testimony that was presented to Congress — it's not long — from a representative of the Humane Society of the United States, "The racing industry has had more than 20 years to discuss, to modify and to approve the drug-control problem. The drug problems at our nation's racetracks are significant. All types of drugs, legal and illegal, are widely used to manipulate betting odds, relieve pain so injured or unfit horses may compete, fix races and deceive potential buyers in claiming races."

Now, that was not said at the hearings in June. That was said in 1981, 27 years ago. That was the first time that federal legislation was introduced dealing with medication and racing and I'm proud or embarrassed to say that I was around at that time, perhaps with a little darker hair. But at that point they introduced what's called the Corrupt Horseracing Practices Act of 1982.

What a nice title. You can tell that when you hear that bill you know you're going to get a fair opportunity and it's going to be a reasoned discussion before Congress. But that bill, which was draconian, would have prohibited the administration of any substance foreign to the natural horse prior to a race. It would have required pre-race testing of blood, physical exam before a race,

analysis of samples after, storage of frozen samples for future analysis, \$10,000 and/or one year in prison for the first offence, \$25,000 and three years in prison for the second one, and penalties could be assessed against the owner. Enforcement was given to the Drug Enforcement Administration which would assess a fee on racetracks for every day of racing to pay for this. Now, the DEA could exempt any state that had adopted regulations that complied with this, and they would not be subject to it, but that was draconian. It's not likely that we'll get to that state this time around; hopefully, we won't get to any state, but that was sort of the mindset then.

When I was preparing for this talk, I went back through the American Horse Council files just to see what was going on then and what people were thinking. I was struck by how similar the situation was then to now. The reasons that were put forth for federal involvement, why the federal government had to get into it was the use of medication corrupts racing, the use of medication leads to injuries of horses and jockeys, the use of medication is inhumane to the horses and misleads the betting public, the industry cannot deal with the problem by itself, there's no central authority. Now, all of those arguments are still made today, nearly 30 years later.

The proponents of the federal legislation were the Humane Society of the United States, but that was a far different Humane Society in 1981 than then \$200 million HSUS which is very involved in political activity now. Wayne Pacelle, the head of it, says, I want to make the HSUS the NRA of the animal welfare movement in the sense of being able to have an effect on politicians, their election, letters, etcetera.

So it's a much different, much more active, much stronger HSUS. Several committed members of Congress were supporting a bill, as they are now. I don't want to give the impression that when you say, Congress is looking over our shoulder, that 535, 435 members of the House and 100 members of the Senate are all looking at us. But all you need in Congress is a handful of committed people to get something started. They're still involved, and our own industry, individual owners, trainers and other entities are calling for federal legislation.

There are also some important differences — I just want to give you a little background to put it in context — some good and some bad. Twenty-eight years ago, the general public wasn't that concerned about this issue. They didn't really care about the Corrupt Horseracing Practices Act and the public in general didn't have a strong feeling one way or the other. Now the public is tuned in and is very interested and it's not, as we heard yesterday, not very sympathetic to our industry following the breakdowns and the situation with Big Brown. The media is much more tuned in, and several studies that NTRA did, and you heard about them yesterday, suggest that there's a large percentage that doesn't care whether horseracing survives and even within our own core fans in the words — and I read this in one of the trade press, so I can say this — in the words of Keith Chamblin from NTRA, "our core fans are pissed."

So the situation in 1981 was considerably different in terms of the potential public pressure and right now. Also, there has been plenty of discussion of steroids in other sports, and Alex Waldrop testified at one of the hearings involving the other sports, and that has spilled over, the word steroid has spilled over into our sport. If you look at the paper today, USA Today, it has, "One year after the Mitchell Report," you know, how has baseball done? It's two pages about the Mitchell Report and what baseball has done with respect to steroids and some of the players. So that's an important difference.

There's also some important positives. There's a much different mindset in the industry now than there was 20-some years ago. In that period it was batten down the hatches, we'll just survive this somehow, we'll get through this storm and not worry about it. It's a much different feeling now, as you well know, and you'll hear more. The NTRA has formed a Safety and Integrity Alliance to come up with uniform medication rules, ban of steroids from competition, out of competition testing, uniform penalties, injury reporting, safety rails, better security, placement programs, all of that is very, very important to show that the industry has taken this seriously. They've hired Governor Tommy Thompson, who was governor of Wisconsin and was in the Cabinet as Health and Human Services Secretary to oversee this and make yearly reports — not sure that they're yearly, but make public reports about what the industry is doing to satisfy those. Let's hope, if there is a similar thing one year later, that the industry will come up with high grades as baseball does for the most part there.

Other organizations, Racing Medication and Testing Consortium, The Jockey Club, TOBA, Graded Stakes Committee, Breeders' Cup, so there's a lot of work being done. That's a considerable amount of activity. It shows that the industry has taken this to heart, is trying to act responsibly, and is, I don't want to say cleaning up its own house, but moving towards better self-regulation.

Did what happened at the Derby force us to do this? No. We started this beforehand, but it certainly was an impetus. It certainly was one of the causes.

Did Congress looking over our shoulder, did the hearing that was held on June 19 do it? Yes.

Is federal legislation the answer? In my opinion, it's not. The issues that we're dealing with are very, very complex. They're technical. The solutions have to be based on research, they have to be fair, they have to be enforceable, they have to be practical. These issues do not lend themselves to the congressional process. The congressional process is based on politics, it's based on press, it's based upon what the people think back home. There is, to a certain extent, a certain amount of posturing involved; dare I say such a thing?

So our issues do not lend themselves to the federal process. But we had the hearing. Those of you who were at the hearing, and some people here today were, some testified, and some saw it on television. It was not a pretty picture. I don't think that the industry came out well with it, not because the industry doesn't have

a story but perhaps because the people that were in charge of the hearing had their own story to tell. At that hearing and since that hearing, members of Congress and some in our own industry have said that there's no central authority. We have to have a league to do this. They maintained that federal legislation is the only way that we can go forward. It was suggested then, it's been suggested since then, it's been suggested today that amending the Interstate Horseracing Act to take care of this, to come up with guidelines and standards on medication, steroids, drug-control, uniformity, etcetera, is the way to go. In fact, some people think that's the only way to go. Some of the members of Congress said, We will work with you.

Like that old joke about I'm from the federal government, I'm here to help you.

So that's the carrot, the stick is, let's change the Interstate Horseracing Act. I worry about this for many reasons, but the main reason is when you get into the congressional process, you can't control it. There are certain things you can control, but for the most part you can't control it. Fred was talking about the Interstate Horseracing Act and why was it written the way it was, but that's not the way it started off. Actually, the first Interstate Horseracing Act, there was no interstate wagering. Just a total ban. Then people said, Well, wait a minute, maybe we could do well here.

But it didn't start off the way it is with the consents and the requirements and the 60 miles, etcetera, etcetera; that was part of the congressional process. Some of the provisions that have been suggested would be put in by members of Congress, regarding, if we did go forward with federal legislation, are standards regarding track surfaces, additional safety requirements, funding for jockeys' and grooms' insurance and backstretch housing — and remember there's already a federal bill introduced in this last Congress by Congressman Whitfield that would ban a horse from racing if it had ever received steroids, not a certain period before the race, if it had received steroids — requiring that a certain amount of the takeout under the Interstate Horseracing Act be used to fund jockeys' insurance and backstretch insurance, and adding a new cause of action which would allow a jockey, exercise rider or backstretch employee to bring a civil action under the Jockeys' Insurance Fairness Act.

Some other requirements are additional testing, a system to track jockeys and injuries, regulation of breeding practices. A number of the questions asked at the hearing on June 19th were on Eight Belles and why she was bred in a particular fashion. Now, we have, not just the Lexington breeders, but all of the breeders are very wise and have a way to do things. But you've got members of Congress up there who've never touched a horse asking about breeding practices. Are we going to have them regulating breeding practices, for goodness sakes?

All of these things are good ideas. I mean, we need jockeys' insurance, we need more safety, etcetera, but do we need it mandated by the federal government by a date certain in a federal bill? Once it's put into the bill, somebody's going to have to write new rules and regulations and that's going to have to be done. That's

a long and difficult process. Once there's a federal presence in racing like this, they're not going to be shy about exercising it. Look at baseball and steroids. About 10, 12 years ago there were a lot of hearings on movement of sports franchises and there will be more because some people are still concerned about it. Once you have a federal bill, an amendment to the Interstate Horseracing Act, which is the most important legislation we have, it's going to be very difficult, next time there's an incident or next time there's an issue or someone goes in and says, and they'll have more hearings on this. Don't believe that this is going to be easy to pass. It's not easy to pass federal legislation. The process could be worse than the cure. If we have more hearings like the ones that we had in June, we didn't come out with a great reputation based on that.

So these are difficult, complex issues, as I say, that don't lend themselves to the federal legislation. There will also be opportunities for mischief. This is not going to be a narrow amendment. For example, when we amended the Interstate Horseracing Act in 2000 to specifically apply to electronic media and our concerns under the Internet, that was a very narrow amendment and the planets were in alignment. We were able to do that because of Congressman Hal Rogers from Kentucky and Senator Mitch McConnell; it did not generate a lot of publicity and it was a very limited change to the Interstate Horseracing Act that, if it got out of control because the people that were doing it were supporters of the industry, and I'm not suggesting the people who are talking about this other part are not supporters of the industry, in that case they could have pulled the plug and we could have walked away with it and started all over again.

This is a little different. This isn't a narrow amendment. There's going to be plenty of opportunities to amend it, and who's going to amend it? Well, you've heard one suggestion today, and I suspect that there may be people in this room right now who would think that that's not a particularly good amendment. I don't think we could pass the Interstate Horseracing Act now, if we had to do it. Because it was a future opportunity and didn't even consider Internet and account wagering, it was a little easier to do. But even so, the process right down to the last second was very difficult and people were saying, well, we need to do this and we need to do that and some of those provisions that were put in there were simply to satisfy constituents and keep the process going forward.

For example, dog racing; wouldn't dog racing love to have — I don't represent dog racing and I'm not speaking for them — but in our issues with the Internet gambling bill, we've always been able to argue and maintain that we need to be treated separately because we have a federal bill, the Interstate Horseracing Act, that specifically allows interstate wagering. Dog racing doesn't have that. They had an opportunity and they decided not to do it about 12 years ago. Wouldn't they want to say, Okay, every time it says horse, just add, and dog?

That would be one way to do it. Then you've got a whole other group in it. What about the problem of Justice, who doesn't agree with our position with respect to the Interstate Horse Racing Act and what it allows versus the wire statute. They're going to be involved in this unless Eric Holder's going to turn that

whole career section around and change that. So the Department of Justice, which has a totally different view, will be involved.

What about an excise tax on gambling? One of the main problems of Congress this year is going to be coming up with funds to fund various programs and there is a book, there's literally a list in the Department of Treasury of bills that can be used to raise revenue in case there's a tax change over here and one of them is an excise tax on gambling. As Congress looks around this and there's hearings about the Interstate Horseracing Act and all of the stuff, an excise tax could be thrown in there.

Establishment of a national league, similar to the NFL, baseball, etcetera, that could be part of the process. Now, I'm not trying to just make this up. Some of these have already been said, some of them are my concerns. The problem is that when you think about federal legislation for horseracing, you think about what you want and what you would do. It might be a very simple five-line bill or something like that, and it would be a very good idea and might be supported entirely by the industry. But once you get into Congress, which has, as I say, 535 fiefdoms, you're subject to the whims of every one of them, many of whom have, might be well-meaning, but don't understand our industry and are more concerned about their constituents. That is the part that would concern me about federal legislation.

When we went through this process in 1980, Senator Mac Mathias, who was a friend of the horse industry, said the last thing that the horsemen of this country need is the muscle of the federal government in their stable. I think that was good advice then, I think that's good advice now. Again, with the people who are involved, the people in Washington, the concern is can we control the legislation? There are alternatives, and you'll hear about one, I believe, in a second, but the self-regulation is the best alternative in my opinion. What we're going through right now with the safety initiative and all the proposals, it's like watching sausage being made. It's not beautiful, it may not be the most efficient, but it is moving forward and it is making progress and that's what I think we need to do rather than turning our future over to Congress. We'll go through that process and convince enough members of Congress who don't have a strong opinion one way or the other to let us go forward, let us do this.

For example, at the hearing, Congressman Cliff Stearns from Ocala, Florida, said, Well, I'm not sure whether we need federal legislation, I think you guys — he was a little more eloquent — should go and try to fix any issues that you have on your own. In a couple years if you haven't, and we still have problems then maybe we should look at that.

But those are the types of members of Congress that, self-regulation, what's being done, and what you'll hear about more this afternoon, is what we should be doing.

Why should we do this? Well, in my opinion we should do it first for the horse and second for the public and third for our fans. The congressional process could take two, three, four years. By then, if we don't take actions, our fans may be turned off and it wouldn't make any difference. We need to do it for our own purposes, not because we're afraid of Congress. We need to be afraid of Congress and we need to be concerned about Congress, but there are other reasons, more lofty, that we should do it. Every organization needs to work together on it and we'd be successful.

In conclusion, should we be worried about, as the little booklet says, should we be worried about big brother? Yes, we should be worried about big brother.

Can we handle this on our own and try to satisfy Congress? I think we can do it. There are organizations like NTRA, as I said, Jockey Club, TOBA, I'm sure I'm leaving some out, Racing Medication & Testing Consortium, all of that who are leading the way and we need to follow. We have to convince our fans, we have to convince the public, we have to convince the media that we are aware of the issues and we are taking action and if we do that we can keep the federal government out of our stables.

Thank you very much.

MR. MARTIN: Our next speaker is not known to you, Rick Masters, and many people for many years have thrown up their hands and said, Well, gee, how are we going to deal with all the different state regulatory agencies?

It's been a longstanding comment by some people in the industry. Whenever a proposal comes before Congress, the NTRA steps forward and says the current state regulatory structure works. The question is, could it possibly work better?

Alex Waldrop stood up in front of the Albany Law School's annual symposium on racing law last August and said the number one problem racing faces is either the inability or the unwillingness of the states to adequately fund their state racing commissions. It was an interesting comment and one that he's not repeated often, although I think he wished he would at state budget times, especially with an industry with such a serious need for an improvement in the public reputation for integrity.

These are tough economic times for states, and the racing industry is not the only industry, not its regulators are not the only regulators who have had to deal with an evolving industry that has become cross-jurisdictional in many ways.

RCI is a trade association that works with all the different industry groups and we try to address some of these issues and try to develop standards with the hope that everyone will adopt them as rules in their different jurisdictions; those are our model rules and those have been heralded extensively before Congress, and it's a good process. Some industries have taken a different path and they've

formed an interstate compact and created a central rulemaking authority, still the state regulators but just reorganized in how they create rules. And in the time of tight government funds, there might be also other benefits to be considered such as the pooling of expenses and resources, and that's why we've brought Rick Masters here.

Rick Masters is a special counsel for interstate compacts for the Council of State Governments. I think this is your first time at a racing symposium or a racing event, and you've written books on interstate compacts and you've helped create them, helped manage them and sort through the different issues associated with one. So we invite to the microphone Rick Masters to present to us probably a new idea for this Symposium.

MR. RICK MASTERS: Well, thank you, Ed. I'd like to thank the University of Arizona for the opportunity to be out here and speak with you about a subject that I've spent a lot of time on personally. Ed made reference to my book, it's a 500-page treatise that the American Bar Association put out on the law and use of interstate compacts. It's a great sleeping aid; if you have any insomnia problems you could throw away your Ambien or whatever you might use. If you read a couple pages I guarantee you'll be asleep, but it is useful to review an old concept that may have some new applications. I want to just spend a few minutes talking about some middle ground between the specter of federal regulation, which I think Mr. Pope and Mr. Hickey agree is not the way to regulate issues such as medication, issues involving wagering integrity and some of the other matters. Then at the other extreme is self-policing, self-regulation. Sometimes that works, sometimes it doesn't; is there a middle ground?

Well, the Founding Fathers wisely provided that to us, and while many lawyers and commentators and regulators have forgotten about these tools, they still remain available to us imbedded within the very text of our Constitution. Dating back to the original ratification of the U.S. Constitution in 1789 is a provision allowing states to enter into interstate agreements or interstate compacts for problems that are peculiarly and properly under the purview of the state governments to regulate if regulation is necessary, as opposed to federal intervention, federal preemption and federal control. Originally, these instruments were used to do things like resolve boundary disputes, but in the modern era, increasingly, compacts have wide varieties of applications for regulatory purposes.

So what's new about them is the way in which compacts are now being used to resolve problems, perhaps such as you are facing, through interstate cooperation. The principal advantage, of course, of an interstate agreement is that it provides states with an effective and enforceable means of addressing these problems without requiring some bureaucracy to be erected on the Potomac after legislation has been passed and rules have been made to regulate it centrally through the federal government. States don't have to relinquish authority if they can enact a compact in which they can collectively manage the problem. There are many applications of this concept.

The first administrative regulatory structure that was managed by compact was created back in 1921. The Port Authority of New York, which has ownership of the campus where the World Trade Centers formerly were located and controls all the transportation issues between New York and New Jersey, is a good example of a regulatory compact and was formed that long ago. We've got compacts today that regulate taxation, environmental matters — show me a river basin and I'll show you an interstate compact that was created by the states to manage pollution control — water allocation and those sorts of issues. There's a multi-state tax compact to regulate multi-state tax issues concerning corporations that do business all over the country. Education, corrections, public safety, and, yes, even racing and gaming, the tri-state lotto compact, the multi-state lottery agreement, the state and Indian gaming compacts, and the national racing compact with which many of you are already familiar and a few of you probably serve on that body.

There's not much in the Constitution about compacts but what is there doesn't mean what it says, according to the U.S. Supreme Court. The Constitution says, "No state shall, without the consent of Congress, enter into any agreement or compact with any other state."

Now, if I ask most lawyers or laypeople, Does that clause mean that all compacts require congressional consent?

Most people say yes, because they reasonably believe that any means all.

Well, the Supreme Court of the United States says that's not so. Any does not mean all, it only means some, and only some compacts require congressional consent and those are those that interfere with or increase the power of the states at the expense of the federal government in some area where there is enumerated power within the Constitution for the Congress to regulate.

Compacts are enacted by states in what commentators and legal scholars and lawyers would tell you is a common law contract process. Basically, these are contractual agreements that states enter into in which they embed the agreement into the statutory fabric of each state. The first state to propose the compact solution becomes the offeror and every other state accepts that agreement and in consideration for the purposes that are accomplished by the compact, a contractual agreement is formed which also has statutory authority within each member jurisdiction that signs the compact.

Compacts are appealing for regulatory solutions, perhaps such as those you're facing, because they offer flexible and enforceable means of cooperation where the states continue to control the process. Jay, quite rightly, criticized federal solutions because you lose control, the states cannot involve themselves to the degree that they would expect with state legislation or state regulation when federal law has taken precedence. States do give up the right to act unilaterally, but frankly, if all states are involved in a problem that transcends the borders of your state, one state can't solve this problem anyway.

What you are doing when you enter a compact is, essentially, creating the same type of uniformity that congressional legislation provides, but without the federal control and the strings that go with it. States collectively manage the problem by creating their own uniform standard that's administered through the vehicle of the compact.

Compacts also can make rules, and perhaps one of the most innovative aspects of interstate compact law in the modern era is the use of compacts for regulatory purposes through delegation of legislative authority by the legislature to what become, in essence, interstate administrative agencies. Like other administrative agencies, the rules propagated by interstate compacts are binding on the states that are signatories and the officials of those states that carry out its purposes. The Supreme Court has said that the state legislatures' ability to delegate authority to an interstate compact administrative agency is an axiom of modern government. In other words, even the Supreme Court recognizes that there are creative solutions that the Founding Fathers provided for us to resolve some of these problems that don't require the Congress of the United States to solve the problem for us.

In summary, some of the key benefits of compacts are increased effectiveness and efficiency at the local level, flexibility and autonomy without giving up control to the federal government, an opportunity to resolve disputes, make rules and engage in cooperative management of problems and, again, to avoid federal intervention. There are a number of different compacts that are in effect that I can give examples of that involve all 50 states that deal with various types of regulatory authority and that have rule-making processes in place that make and publish rules in a procedural process every year. The interstate compact for adult offenders, for instance, moves approximately 300,000 probationers from state to state and governs the process by which those folks move about the country. That's controlled by the states, not the federal government. Interstate compact on educational opportunities for military children creates authority for states to allow children of deployed military members to transfer from one school district to another and eliminates the disparities and conflicting regulations for school enrollment and various aspects of public school education in the K-12 years.

If this process was something that you wanted to explore, it's important to get all the key players, certainly within the state government. You need executive, legislative branches involved and aware of what's at stake and how this compact could be used to solve the problem. You need all of your external stakeholders at the table, groups such as RCI, the national associations of racing interests, academic and scientific researchers, other industry stakeholders and possibly inviting federal agencies to show them what is being done to address the problem. After that, in many of these cases where national compacts have been used in this way, advisory boards have been formed composed of various stakeholders to try to put these ideas together into a legislative solution. A drafting team is typically formed using appropriate means and a process to deal with all of the issues and incorporate that into some model legislation. The final product, of course, is then introduced to the state legislators in perhaps some sort of legislative briefing that

can be organized with the help of the stakeholders as well as the state partners. And this is rolled out to the legislatures of the states for consideration.

This is a dynamic process. It's been used in the recent past in two of the compacts that I mentioned to you. I certainly would propose that if you are compelled to a solution that involves legislation, certainly compacts should be considered as a middle ground, rather than big brother.

Ed.

MR. MARTIN: Thank you, Rick. Does anybody have any questions? Comments?

Let me ask a quick question; we're running right up against the clock but we've got about two minutes left, in which case I don't want to delay anybody from their lunch. Fred, you've made some proposals that would totally restructure the business model. I would ask Rick, are the kinds of proposals that Fred is making, to redefine the business model, is that something that could be achieved through an interstate compact as opposed to opening the Interstate Horseracing Act? Is that a better vehicle for this industry that's been reluctant to address the Interstate Horseracing Act?

MR. MASTERS: It's certainly a solution that could be employed, the problem being the fact that you already have a federal statute in place, and how to undo that problem before you attempt to take an interstate solution. One solution would be amending the IHA to allow states to form a compact to manage the problem instead of dictating it and mandating it through the legislation itself.

MR. HICKEY: Let me say something. It's always dangerous to say something when you don't know the answer. Actually, I'm not so sure that the Interstate Horseracing Act requires a certain business model; it just requires certainly consents and certain approvals. So five percent, eight percent, all of that could be done perhaps under a compact, without amending the Horseracing Act. The Horseracing Act doesn't set up certain percentages, so it's possible you may not even have to fiddle with the Horseracing Act.

MR. MASTERS: Well, that would even be better.

MR. POPE: Let me jump in there. I think the problem is the receiving tracks are the bet-takers, and that's what you can't get across by any other means other than you take them out of the — earlier this year it was asked, could this be done on a state-by-state basis? Could we have a revolution in every state and change people that are approving and disapproving the agreements? And I've been through the process of trying to put together a national consensus on a program and I can tell you that too many people have power, the power to say no. And that's all it takes. Under the current Interstate Horseracing Act, the receiving state approval is enough to stop the process. I don't want to be Chicken Little, but the collapse of the auto industry is not a unique thing and I don't think anybody has any idea how seriously flawed this business model is, and once we start losing our major tracks, I

don't think anybody has any idea where 70,000 horses in training are going to start finding homes and how this industry changes.

I'd ask everybody to take a look at it; I understand Jay's reservations, but I think we're headed for something that has been inching up on us and inching up on us and that nobody has any idea how serious this problem is right now.

MR. MARTIN: Anybody have any other comments or questions?

Jay, do you think it's possible to get the industry on the same page to do a massive change in the business model or how the integrity function of the state regulatory commissions could be funded adequately?

MR. HICKEY: Are you talking about Fred's idea of changing the Interstate Horseracing Act or what Congressman Whitfield was talking about?

MR. MARTIN: I'm talking about just getting the different industry associations, the different industry interests. One of the things I've noticed is that you've got people in a very disjointed way going four or five different directions and trying to solve and address the same problem. Is it possible to get this industry on the same page?

MR. HICKEY: Well, to paraphrase what Alan Marzelli said at the hearing on June 19, I'm an optimist. I think that it is possible and there's no way that you would pass federal legislation unless the industry was already on the same page. So if you can get on the same page with the business model or anything else, or the self-regulatory, then you don't need the federal legislation.

MR. MARTIN: Still, the question of self-regulatory versus self-policing comes into play. I guess I'm just curious because I do know that the different groups have looked at the concept of an interstate compact and somebody suggested to me that if we had an interstate compact, similar to how we deal with some of these issues in Canada where we have a Canadian Pari-Mutuel Agency who handles wagering security and drug testing, and an ability to fund itself, and the provincial racing commissions which handle the adjudication and the investigations and the judging and officiating of the races, and you funded it the same way they fund it in Canada, you could probably double the amount of money spent on drug testing at levels where we need to be. You would also have money to spend for the entire independent analysis and monitoring of the wagering system, and I believe you'd have about \$30 million leftover for equine research. Well, I guess I wonder why those groups have not embraced that idea? I know some of the members of RCI are having general discussions about, is that a potential vehicle that might make sense on a state-by-state basis, but for all those industry groups that consistently stand up and advocate uniformity or walking in a common way, why have they not taken a hard look at what Rick's talking about?

MR. HICKEY: That sounds like a rhetorical question to me.

MR. MARTIN: Sorry.

MR. HICKEY: I can't answer that question. The Horse Council does what those groups tell us to do, not vice versa. It's not a new question either.

MR. MARTIN: Rick, you've probably seen that in different industries.

MR. MASTERS: I was going to say, not infrequently the pressure from above is the most compelling motivational force to consider a compact. If, as Jay predicts, they get more serious about some of these issues, start holding additional hearings and even get to something even approaching the Corrupt Practices Act that was put forward in '82, I suspect there will be a lot of folks that would be a lot more interested in some regulation at the state level like a compact.

MR. HICKEY: Well, as Winston Churchill said, there's nothing that focuses a man's mind as execution in the morning.

MR. MARTIN: Hearing no further questions or anybody that wants to say anything, thank you all for coming on this final day. We appreciate your time.



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