



Race Track Industry Program

**36th ANNUAL
SYMPOSIUM ON RACING & GAMING
TUESDAY, DECEMBER 8, 2009**

Interstate Compact

Speakers:

Rick Goodell, Assistant Counsel, New York State Racing & Wagering Board

Peggy Hendershot, Senior Vice President-Legislative Affairs, NTRA

Rick Masters, Attorney, Council of State Governments

Mr. Doug Reed: If you're out in the foyer waiting for the next session, please come on in because we're going to get started to stay on time because we've got a nice luncheon afterwards. Thank our panel sponsor, International Sound, also our refreshment break, Equibase, a sponsor.

A special announcement — well, not a special announcement, an important announcement, maybe a little confusion — the luncheon is at noon, noon to 2:00, down in the Pavilion, which is just outside the front door to your right. Anyone that's registered and has one of these is certainly welcome to the luncheon. It's not a by invite only, it's not for TPA members only. It's an awards luncheon of Turf Publicists as well as the Race Track Industry Program Awards luncheon, so you're more than welcome to the luncheon afterward.

Rick Goodell is our moderator here, and I think this is a return engagement. I think Rick's been here before. Rick is the assistant counsel for the New York State Racing and Wagering Board. He's also chairman for the National Racing Compact, vice chairman of the RCI Model Rules Committee, and he's a Columbia Law School grad, so please welcome our moderator, Rick Goodell.

Mr. Rick Goodell: Good morning. Each of us three speakers will talk for a couple of minutes and then answer any questions that there might be from the audience.

We're going to be addressing the subject of a proposed interstate racing and wagering compact, which I think could be summarized as the state racing commissions having the option, in consultation with the industry, to jointly make rules and programs.

New York State has pending legislation to form an interstate compact that we believe will correct long-standing problems and be a significant step toward uniformity by creating a mechanism for state racing commissions to act in unison.

The long-standing problem I'm referring to is the lack of a mechanism for state racing commissions to act together. For example, there are a number of obstacles after we reach a consensus with the industry and each other on a model rule proposal to making that become a uniform rule. First, the racing commissions go back to their collective states — their individual states — and decides individually whether to proceed and how to proceed. The stakeholders have to repeat their efforts to be heard in each state. There's no shared review of the public comments that are taken in individual states among the states before they adopt the rule. There are different types of rulemaking impediments in each state, including forces and influences that are outside of racing. There's no central oversight of whether the individual states are making changes to the uniform rule, the proposed rule, and there's no mechanism to vote simultaneously.

What we're proposing is a new structure to allow the states to adopt rules together. Now, our concern is not to replace state authority typically exercised by state racing commissions with some sort of federation of federal control. We recognize the advantages of local control, having access for the industry to voice its concerns and to influence decisions within its own state, and we don't need multiple layers of expensive bureaucracy or decisions being made in distant places by people we don't know and people who may not have time for us.

We want to build on and improve the existing system, and we think the best way to do this is to give the states the option, in a forum that incorporates industry participation, to act in unison.

This is the proposal for an interstate compact. First, by enacting the same legislation in each state called enabling legislation to create a compact, the member states will form a compact commission. The commission will have the authority to make rules, not through state rulemaking processes but through a process that is run by the compact commission. We will establish standing committees to have industry and state regulators work together to attempt to reach a consensus for new rules or to improve existing rules. Once we have reached a consensus, these proposed rules will be published in all of the member states with the exception of any state that has an objection to that. We will conduct a joint review of the public comments that are then made. Member states will be able to simultaneously vote to adopt the proposed uniform rule, and in all the compact states — states that vote for it — the proposed uniform rule will take effect immediately as the state rule.

Now, most of the work that would go into making uniform rules would be working together to achieve a consensus. All the hard work is going to be done before the formal publication of the rule, and this is a little bit of a review of something you heard 20 seconds ago but we would create standing committees to build consensus.

In an improvement over the existing RCI model rules process, the industry will be at the table when the compact rules are voted upon to be published and to be adopted. There will not be separate meetings later, and one of the big advantages of having this type of a system, it will be much easier to use a uniform national rulebook that can be incorporated by reference.

One of the legal obstacles to a model rule system, where the national rulebook is not printed in each state code, is that whenever there's a change to a national rulebook, each state has to again adopt the change. If you have a national rulebook, clearly it's impractical to expect 38 racing jurisdictions to quickly and uniformly and simultaneously adopt the national rulebook whenever there's a change made. Clearly, that would be a lot easier if the states were able to act together with a single vote, a single rulemaking process.

The formal process that follows all the hard work in achieving a consensus and deciding to publish it is required by law, and it does give people who may not have a voice at a national level to provide their comments to their state racing commissions on a state-by-state basis, and that would be followed then by a final vote at which a rule could be adopted by all the states that support it.

We've taken a look at a draft business plan, for which we project an annual cost, if we adopt the business plan, of about \$360,000 annually for a central staff, including a rules coordinator and some support staff.

The rules coordinator would play this role — keeping track of the progress being made by the various committees that are attempting to reach a consensus, making sure when a proposal has been formulated that it can be written to fit into the existing state rulebooks in each state, making sure that it's properly posted on our national website, making sure that the proper procedures are followed during the rulemaking process that is conducted by the compact commission, publication to those who are entitled to it, responses to public comment, meeting deadlines and those sorts of things, and finally, pushing for uniformity among the member states.

We have not decided to adopt that business plan at this time, but rather we would prefer to use existing RCI resources and state racing commission resources to implement the compact, at least at the outset. RCI already developed proposed national programs and rules, conducts rulemaking sessions, and the state racing commissions clearly are already involved in rulemaking.

The compact also provides a mechanism for funding by fees, license fees, for example. Compact programs we would attempt to fund with user fees, but there would also be a potential for a need for some central staff funding. We foresee a transition period with little or no expense, but the possibility, depending on how successful the compact is and how extensive its work becomes, for the necessity for a national staff.

These are the general details of the proposed contract. State consent would remain a requirement in each state for a rule to take effect in that state or for a program to take effect in that state, and that applies to any compact fees that the compact commission might create.

Uniformity depends on a workable system and leadership. This gives us a workable way to implement rules once we reach a consensus. We don't have that now.

The racing commissions would still enforce the rules. Possible funding, many of you know that there's an existing national licensing compact that offers an occupational license that can be used in most states and for most races around the country; as this compact grew in membership, it would have all the rights and powers of the licensing compact and would eventually absorb it.

A final point is that the rules that would be made by the compact commission would take effect in each state as a state rule. In the enabling legislation any given state can also ask their legislature to give them greater authority to make rules. For example, if they have outmoded penalty provisions in their statutory law, this would be an opportunity in the enabling legislation to give the compact — or the racing commission through the compact — the ability to create a penalty system that would be consistent or uniform around the country.

This proposal, this compact, will not solve all of our problems, and, quite frankly, some issues are too contentious to be resolved by an interstate compact unless and until industry and regulators can reach a consensus. The compact does not propose to compel a solution. It only provides a mechanism to act once a consensus is reached. Many people in industry and in state racing commissions, including stewards, executive directors and commissioners, are sincerely committed to uniformity, and the lack of a mechanism to allow them to implement solutions when we reach them and that work together can be corrected.

Since New York proposed our bill this year — and it's still pending in our legislature — we've been working with others to develop a model bill. The New York bill has been reviewed by numerous racing commissions and their staff. The principles that I've spoken about this morning have been endorsed by the RCI at its July 2000 meeting in Del Mar. After that time, we've had

several meetings with interested industry groups and other regulators to study the proposal, and we've improved the New York bill. The Council of State Governments has greatly assisted in drafting a model bill, and that model bill, as well as some other informational material, will be available for anyone who's interested after the program.

With that, I'd like to introduce, from the Council of State Governments, Rick Masters.

Mr. Rick Masters: Thank you, Rick, and it's great to be back at RCI and to talk to you once again about the subject of interstate compacts in the context of various uniform standards that Rick has been referring to in the racing industry.

There are a number of points that could be made about interstate compacts. My role with the Council of State Governments is as special counsel to advise states on the use and application of interstate compacts. I've done this for the past 20 years and have been part of the drafting process with numerous compacts, including several that have 50-state membership. I've overseen the drafting and implementation of these, have been involved in ongoing legal advice and research in this area and occasionally get involved in litigation involving interstate compacts.

I've written a book on the subject the American Bar Association has published that gives a lot of the case authority, which I will spare you from this morning. My book is right up there with the Amish Phone Directory in terms of sales, but it is handy if you need it. For those of you who don't know, the Amish don't have phones. But in any event, there are lots of citations that are available in written form should you or any of the attorneys that advise you have questions about these instruments.

One of the things I'd like to make crystal clear is these mechanisms are not new. They've been around since the Constitution of the United States was adopted in 1789, and you can see that provision, called the Compact Clause, if you're interested, in Article I, Section 10, Clause 3 of the federal constitution.

What is new about compacts is the innovative ways in which states have been applying these instruments. Essentially, a compact is a contract between the states that is statutorily enacted by the legislature of each state, and once it is adopted it has the force and effect of law. These aren't just cooperative agreements. They aren't just consortiums. They aren't just associations that are formed for the purpose of coordinating and cooperating. They are enforceable statutory contracts.

There are various compacts that have functions that range from boundary disputes, which was one of the early uses of compacts which actually predates the Constitution, to management of environmental problems and

environmental resources such as natural resources, such as rivers, river basins, and other environmental areas that need to be managed by more than one state. Show me a river basin; I'll show you an interstate compact that manages a problem pertaining to that environmental resource.

More recently — and by that I mean during the 20th century and into the 21st century — compacts have been used increasingly for regulatory purposes that govern anything from multistate taxation to transportation issues to education issues to corrections, criminal justice, and yes, even gambling. There are several compacts that regulate lottos in various states. Rick's already made reference to the licensing compact that is already in effect in this industry.

These compacts can be used to create independent multistate authorities to address issues that need to be managed by the states and that the states want to continue to manage. The primary advantages of the compact is that it establishes the opportunity for states to create uniform guidelines and standards, including promulgating rules, without the necessity of the federal government to intervene or even take over an area, which seems to be a pattern more recently. In fact, compacts enjoy not only the status of state law, as do their provisions, but also can be given delegated authority by the states to make rules.

So as you can see, with a uniform set of principles that states can use to avoid federal preemption, you can create some economies of scale, can respond to problems on a national basis with one voice when that's necessary, but yet the states can retain sovereignty over issues belonging to the states and not relinquish that control to the federal government.

Just in case you're wondering — and you can't really see the numbers very clearly — but most states are a member of at least two dozen compacts, some even more than that. For instance, you'll see Arizona there has 27 compacts that are currently in effect.

So, again, these are not new. These are not mechanisms that legislatures are unfamiliar with, at least not historically, and every state belongs to a couple dozen of these interstate compacts.

So what are some of the benefits that can be derived for the racing industry and racing regulation? Well, effectiveness and efficiency, rather than having to go back to your individual states to adopt laws on a case-by-case basis or state-by-state basis, being a member of a compact that would delegate rules to the regulatory authority set up by the compact would allow you to agree that there ought to be a uniform standard and then act on it without having to go back again to the legislature. You get that authority one time when the compact is adopted, and then you have the authority to make rules on an ongoing basis.

It does give you flexibility and autonomy compared to national policy. There is not some government bureaucracy in Washington that will be giving directives to you on how to run this industry or to even threaten to do that or at least this would be a good defense against any attempt to do that on a federal level.

There are times when uniformity is desirable but can't be achieved without some consensus building, and so this compact the way it is drafted would allow uniformity but would not force a state to go there until you were ready and until you have decided that it's in your best interest to do so.

Compacts also provide for dispute resolution mechanisms among the states. If states disagree on issues or somebody is not complying with what you've agreed to do, the compact provisions can allow those sorts of disputes to be resolved.

Again, state sovereignty is protected. The Council of State Governments has been involved for 75 years in promoting the role of the states in the federal system, and a compact is one of the primary ways that that is done. It protects against what some have called coercive regulatory federalism.

Cooperative behaviors among member states can lead to win-win situations, and there are some defenses against the threat of federal preemption, as was previously mentioned. It resolves the problem of 50 different sets of rules so that you can and are encouraged to form one standard.

There can be technological development which occurs jointly among the states so that data that is required to be exchanged can be done under the auspices of the compact if you were in a position to believe that that was a good idea, and it does allow for consideration of industry and other groups that are stakeholders and gives them a role in this process.

Various examples of compact activities that are common to existing regulatory compacts involve a national data and information sharing system, enhanced enforcement and compliance mechanisms — you don't just make rules; you can enforce them — uniform compact language and rules, a national office staff if necessary which can engage in issues such as training. Perhaps you might want some expertise that could be centrally located or contracted by the states to come in and do some training with racing commissioners or with various staff in your states. Effective governance structures are provided, uniform operations and procedures, national interface with all the stakeholders and national organizations that have an interest in this activity, and coordination with any other compacts that are currently in effect, in this case such as the licensing compact.

So I'll leave you with five keys to success that is important in developing a compact.

Rick has already talked about some of the implementation steps that have gone into drafting the compact that is currently in existence that all of you are welcome to review, and what we have tried to do in formulating this on a somewhat expedited basis is make this an inclusive process where industry, regulators and all of the constituent groups and stakeholders were at the table.

There needs to be an effective spokesman in each state for an idea like this. It's not sufficient simply to promote such an activity at your national meeting. We really need a champion in each state that believes that this is a good idea and would improve the situation concerning the regulation of racing in your states. There needs to be a broad-based strategy to do that. There needs to be a proactive transition plan.

Not only are state regulators important but industry is important to be at the table. Governors and their staffs need to be involved in this process. Certainly other elected executive officials and appointed agency officials as well as legislative leaders and legislators, particularly those that have been interested in horseracing issues in the past. They're very likely to be interested in this as well.

And again, you can't say enough about the importance of external stakeholders, including other national associations, media, academic and other research agencies that you have relied on and will continue to rely on, industry and perhaps even some federal agencies.

The process that we've used so far I think has followed this model, where we have an advisory board that has given guidance to this compact. We have a drafting team that Rick and I both have been part of as well as Peggy Hendershot. We have a nearly final product which still has some adjustments that need to be made, but we think we've reached a point where we've got critical mass that will be beneficial and should pass muster with the majority of those interested in this process within the states.

Here's some of the principles we followed in terms of that drafting — what degree of complexity there needs to be, what regulatory issues are common. Certainly the issue of whether or not states should be forced to adopt uniformity, it was one of the issues that we tried to be sensitive to, and we've reached a consensus model where it is possible for this compact to produce uniform rules that are in effect in every state but you're not forced to do so until your state is ready to do so.

So I'll leave you with these thoughts. Compacts promote cooperative behaviors rather than self-interest. Compacts promote collective actions among the states rather than individual self-serving actions. Compacts promote uniformity rather than disparity. Compacts promote state alliances rather than state rivalries. Compacts promote cooperation rather than competition, and perhaps most importantly, federalism without Washington.

Thanks. Let me introduce Peggy Hendershot.

Ms. Peggy Hendershot: Okay, I'm Peggy Hendershot. I'm with the National Thoroughbred Racing Association. I'm the organization's legislative director, and I'm here to give you a non-lawyer perspective on a racing compact.

About a year ago the NTRA was looking at something called the NTRA Safety and Integrity Alliance. Most of you are now familiar with this organization I hope, but at the start-up phase this followed in the aftermath of Eight Belles and also a very lengthy and brutal congressional inquiry into our industry.

We were contemplating how we were going to form and formulate the Safety and Integrity Alliance. Would it be a committee, would it be a self-regulatory organization, which is what we ultimately ended up with, or would it be sort of almost a league concept?

We needed some expertise on a league. You know, let's go talk to the experts. We went and talked to the NFL, so we told them about our industry, and we told them about its differences. We told them about its 38 racing jurisdictions, where no two rules are alike, and our counsel listened very intently to this conversation for about an hour and finally he said, "The only thing that we have in common is that we are United States citizens." There was just no connection between the horse racing industry and a league structure in the opinion of the NFL's counsel.

So really our very first situation is that we do not have — do we have to keep clicking here — we have no structure to implement national governing rules. We don't have an antitrust exemption like the leagues do, and we simply do not have any sort of top-down structure to make things happen in our sport, so the result of that is that we have no national rulebook. We don't have any referees in black and white striped shirts to interpret the rules anytime our sport is being played on the field.

What we do have is we have Congress. We have congressional oversight in the form of the Interstate Horseracing Act. Now, the IHA governs us at the federal level, but it pushes that regulation down to the states, and those business-to-business relationships are also at the state level. At the same time, Congress is always watching us because we have essentially a national sport that's governed and regulated at the state level.

At the same time, as you've heard from other panelists, the states cannot act simultaneously. They can't make their rules at the same time. They meet at different times, at different years. There is no opportunity to act in concert.

Finally, the other part of this situation is that the stakeholders really have relatively little access to the rulemaking process, so the current system is very, very unstructured.

But all is not lost; uniformity is actually easier to achieve than it would appear. Only six states account for 50 percent of racing purses. If you throw on one more state — and you know all the usual suspects; we're talking major racing states that most of you could probably name pretty quickly — so seven states, 60 percent; 16 states are all that is needed to affect 90 percent of racing purses. Essentially you can achieve substantive uniformity with far fewer than all 38 racing jurisdictions. You don't have to line up the whole Rubik's Cube; you don't have to have a perfect system where all 38 states sign on simultaneously. You can start with six because that's all that is really needed to initiate this compact, so start with six. Add on knowing that all you have to do is pretty much get to 16, and you have, for all intents and purposes, uniformity.

What's in it for the industry? A lot, but really I think the most important thing is at the very top and that is that these stakeholders get to participate in this process throughout the process. Advocacy is integral to this whole thing.

So this is going to work a lot like a legislature only better. That's because our committees — our individual industry committees, that most of you are familiar with and already exist, would interface with those committees on the opposite side — on the regulatory side, to discuss issues that are very specific to each of those respective committees. What you'll also have, then, is uniformity among the compact states, and this is going to be very fast track to a national rules book.

The compact commission also really provides a forum for us to discuss a lot of those issues. There are so many things out there right now that are small differences between states that just make it really a big hassle for people to participate in our sport. This is one place where we can fix all of those little differences between states that make it difficult for horsemen and trainers, just everyone, to participate in our sport, but this is also a place where we can discuss bigger issues, like safety.

We think that this is a great thing to help us implement the reforms that are envisioned in the NTRA Safety and Integrity Alliance because all the states would adopt that same uniform rule, and we would have uniformity across states, particularly on safety issues that we all agree on, so it will not only simplify our industry, but it would also give us some direct input into the compact.

The compact will cover what we think it wants to cover, so we have a stake and a say in what is going to be in that compact, and then we also have a compact administrator, and that person's job is to get results. That person

would function very similarly to a party whip, where the person's job is to say, "We need to get this rule done. We need to get a rule, and we need to get it done."

Rick has already described — both Ricks have already described what the compact rulemaking process is like. It's pretty similar to what we have, so it's not as though anybody is going to be operating in a whole new system where there's a huge learning curve. They'll already understand pretty much everything that's up on this slide. It's what regulators already know, understand; our industry knows and understands it, so we're not doing something that is just completely new and out there.

I think the most important part of this process is the speed of the process. Once the rule goes through all of these steps and you get down to that final vote, it's adopted. It's done. We're finished, and we can move on to another issue. A process that now potentially takes years, because of the delays and disconnects between our different legislators meeting at different times and different places, is dealt with, and a process that was years long is now perhaps months long.

How do you pay for it? Well, we are working right now on raising funds to underwrite the start-up costs, and that's really just the legislative advocacy that you've heard here today, leave behinds, PowerPoint's, white papers, those sort of basic things so that we're all talking off the same page.

NTRA has committed funds from its budget as well as staffing, but really the long-term issue here is self-sufficiency; that self-funding mechanism that we have to write into this compact is going to ensure that it functions and it continues and it can do what it's designed to do. That eliminates the uncertainty that you always have with voluntary contributions, where you just don't know — are you going to be able to fund those essential activities that you need to carry on?

So Rick mentioned that the cost is going to be about \$360,000 a year. I think that cost is very small when you consider your alternatives, which are government intervention — and believe me; Congress has called us up to the Hill at least three times in the last five years — or the status quo. When you spread that cost across all of the different states, it becomes a far more manageable price tag. By Washington standards, this is the cheapest form of federalism you will ever see. This is not an unfunded mandate; it's not a huge bureaucracy. What it is — is a right-sized form of government that fits our industry's uniqueness and its historical precedence — you're federal, you're a national sport, you're regulated at the state level.

So we need support from industry members, and that's what we'll be working on over the next many, many months. We have a steering committee, as Rick mentioned, that has been organized to initiate this process. We are working with the usual alphabet soup in our industry. We are going around

and talking to each of our stakeholder groups, so the NTRA has been involved, the HBPA, RCI, the Jockey Club; Harness Tracks of America have also been spoken to and many people in California; that will be an important state for us, obviously, and we just continue to go down the list, so if you haven't heard from me yet, you will eventually. We're also still identifying who needs to be on the steering committee. We want this to be an inclusive process because we understand that everybody has to agree, everybody has to have a stake in the game.

So what we really need the industry people to do is three things — endorse the initial compact bill, which we'll be sharing, we'll be putting out among our industry associations asking for your comments and input, lobby your state legislature to adopt it, and finally, and this is the most important thing, participate in the rulemaking process. This is creating a forum for our industry to have a public-private partnership with our regulators, where we can talk about issues that matter to all of us and get a consensus and agreement and move a rule through in a very short period of time.

Thank you.

Mr. Rick Goodell: I guess I'm the closest thing to a moderator, so if there's anyone with any questions, if you'd approach one of the microphones, we'd be more than happy to discuss things with you.

Well, we planted some people, but they must have gone home.

I would like to remind you that at 11:45 the NTRA Safety and Integrity Alliance program will begin featuring the Honorable Tommy Thompson, and thank you for your attention.

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RACE TRACK INDUSTRY PROGRAM