

# PITTS VS. BARR-TONKO BILLS: AN IN-DEPTH COMPARISON OF PROPOSED ANTI-DOPING LEGISLATION IN HORSE RACING

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## I. INTRODUCTION

Changing an established procedure or method often results in strong positions. Horse racing is no exception. Although many in the industry feel that the current methods and laws for medicating race horses are in need of improvement, as Figure 1 demonstrates, exactly how this matter is dealt with has organizations, owners, trainers, jockeys, and animal advocates arguing about the best way to do just that.<sup>1</sup> Whether you like it or not, the horse has left the barn on this issue. Just over a year ago, the most recent versions of two-horse, anti-doping bills were introduced before Congress: The Horseracing Integrity and Safety Act of 2015 (“HR 2641”) filed on June 3, 2015 by Rep. Joe Pitts (R-PA),<sup>2</sup> and The Thoroughbred Horseracing Integrity Act of 2015 (“HR 3084”), filed on July 16 by Rep. Andy Barr (R-KY).<sup>3</sup> Although similar in many ways, each has a different scope regarding the types of racing to be regulated.

HR 2641, hereinafter referred to as the Pitts Bill, proposes a ban on providing medications within twenty-four hours of a race, and a “three strikes and you're out” penalty for

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<sup>1</sup> Ray Paulick, *Barr-Tonko Bill Delivers What Thoroughbred Industry Wants, Needs*, PAULICK REPORT (Aug. 11, 2015, 1:51 PM), <http://www.paulickreport.com/news/ray-s-paddock/barr-tonko-bill-delivers-what-thoroughbred-industry-wants-needs/> (according to a Paulick Report online user poll, the majority of those in the thoroughbred racing community favor an independent, non-governmental agency for overseeing medication regulations) [<http://perma.cc/J3TW-S9RF>].

<sup>2</sup> Horseracing Integrity and Safety Act of 2015, H.R. 2641, 114th Cong. (2015).

<sup>3</sup> Thoroughbred Horseracing Integrity Act of 2015, H.R. 3084, 114th Cong. (2015).

Thoroughbred, Quarter Horse, and Standardbred racing.<sup>4</sup> HR 3084, hereinafter referred to as the Barr-Tonko Bill, proposes the creation of a federal, non-governmental racing organization, overseen by the United States Anti-Doping Agency (“USADA”) and, as its name suggests, would apply solely to Thoroughbred racing.<sup>5</sup> Barr-Tonko's provisions are based, in part, on the USADA Protocol and its attached World Anti-Doping Code Articles, employing existing industry “best-practices” to create a uniform, anti-doping program similar to the one successfully used in human sports.<sup>6</sup>

Both bills have been modeled after prior similar bills and existing regulatory regulations that govern anti-doping in human sports.<sup>7</sup> The impetus for proposed legislation is a desire to utilize federal law to empower a private, not-for-profit, anti-doping entity that would create a body of uniform rules to promote interstate business, competition fairness, and customer confidence in the sport of horseracing - the same as exists in human sports.<sup>8</sup> Although the two bills have their share of supporters and detractors, there is a general tone in the industry that some kind of oversight is needed when it comes to medication regulations in horse racing.<sup>9</sup>

Figure 1 below shows the results of an online reader poll, indicating that 70 percent of 1,678 readers who participated in the poll are in favor of an independent, non-governmental agency to oversee Thoroughbred racing.<sup>10</sup>



<sup>4</sup> H.R. 2641 § 4(b)(1)–(3).

<sup>5</sup> H.R. 3084 § 5(a).

<sup>6</sup> *See id.* § 2(5)–(6).

<sup>7</sup> *Compare* H.R. 3084 § 2(5)–(7), *with* H.R. 2641 § 4(g).

<sup>8</sup> H.R. 3084.

<sup>9</sup> *See* Paulick, *supra* note 1.

<sup>10</sup> *Id.*

**Figure 1** According to a Paulick Report online user poll, the majority of those in the Thoroughbred racing community favor an independent, non-governmental agency for overseeing medication regulations. Source: <http://www.paulickreport.com/news/ray-s-paddock/barr-tonko-bill-delivers-what-thoroughbred-industry-wants-needs/>.

## II. COMPARISON OF THE PROPOSED LEGISLATION

These dual horseracing anti-doping bills, while broadly similar, differ in scope. A comparison and analysis of the specific provisions/elements of each proposed bill follows. For convenience and ease of distribution, an abbreviated version of this comparison has been provided in Table 1 below.

### A. *Veterinary Ethics*

The Pitts Bill mandates that all drug treatments adhere to the Principles of Veterinary Medical Ethics of the American Veterinary Medical Association (“Principles”) that are in effect on the date the bill becomes law.<sup>11</sup> The Pitts Bill would effectively codify the 2015 versions of those Principles permanently, as federal law, thereby requiring periodic acts of Congress to keep up with changes made by the American Veterinary Medical Association.<sup>12</sup>

Conversely, the Barr-Tonko Bill dictates that the Principles are to be “considered.”<sup>13</sup> As proposed, the Barr-Tonko Bill does not require adherence to the standards of veterinary ethics, unless required by a governing organization called the Thoroughbred Horseracing Anti-Doping Authority (“THADA”), which would be created as part of the Barr-Tonko Bill.<sup>14</sup> This organization is explained and analyzed further below.

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<sup>11</sup> H.R. 2641, 114th Cong. § 3(2).

<sup>12</sup> *See id.*

<sup>13</sup> H.R. 3084 § 7(a).

<sup>14</sup> *Id.*

*B. Raceday Medication*

The Pitts Bill bans the administration of all medication within at least a twenty-four hour window.<sup>15</sup> Although some might call this a “ban on race day medications,” the Pitts Bill explicitly does allow for the use of medication that can affect the outcome of a race so long as it is given more than twenty-four hours before a race, and the application meets the USADA’s guidelines.<sup>16</sup> Many would argue that a true “ban on race day medications” would absolutely ban the presence of performance enhancing drugs in a horse during a race rather than merely prohibiting administration of any drugs within twenty-four hours of that race, principally because some drugs, such as Phenylbutazone, have performance enhancing effects that last for longer than twenty-four hours.<sup>17</sup>

The Barr-Tonko Bill leaves open the question of whether or not to ban the administration of medications on race day or to go further and ban medications that may have an effect on a horse on race day.<sup>18</sup> Addressing the issue about race-day medication is left to the discretion of the THADA.<sup>19</sup>

*C. Character of the New Anti-Doping Authority*

The Pitts Bill designates the USADA as the independent, anti-doping organization to regulate interstate horseracing at the federal level.<sup>20</sup> Conversely, the Barr-Tonko Bill supplies much more detail about the authority to be created.<sup>21</sup> Specifically, if enacted, Barr-Tonko would create the aforementioned, non-profit corporation, the THADA.<sup>22</sup> Pursuant to the proposed Barr-Tonko Bill, the THADA would initially be composed of the following:

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<sup>15</sup> H.R. 2641 § 4(b)(1)(C).

<sup>16</sup> *Id.* § 4(b)(1)(A)–(C).

<sup>17</sup> See Sid Gustafson, *Drugs and Racehorses*, N.Y. TIMES: THE RAIL (Jun. 4, 2008, 3:42 PM), <http://therail.blogs.nytimes.com/2008/06/04/drugs-and-racehorses/> [http://perma.cc/4PRM-MN44].

<sup>18</sup> H.R. 3084 § 2(4).

<sup>19</sup> *Id.*

<sup>20</sup> H.R. 2641 § 2(1).

<sup>21</sup> H.R. 3084 § 2(4).

<sup>22</sup> *Id.* § 5(a).

- (a) the Chief Executive Officer of USADA;
- (b) five USADA board members; and
- (c) five representatives of the industry itself.<sup>23</sup>

These five industry representatives would be selected from owners, breeders, trainers, veterinarians, racing associations, state racing commissions, and jockeys.<sup>24</sup> Should the USADA later withdraw from direct participation, the newly formed the THADA would continue under the governance of the five industry representatives and by its governing bylaws.<sup>25</sup>

The Barr-Tonko Bill further provides that no THADA Board Member would be allowed to have a financial conflict of interest.<sup>26</sup> Specifically defined areas of conflict of interest include the following:

- (a) provider of goods or services to covered horses;
- (b) as an officer or official in the Thoroughbred industry; or
- (c) as an employee of any of the above.<sup>27</sup>

The THADA Board Members would serve staggered, three-year terms to assure that the entire board will not be replaced at once.<sup>28</sup> The THADA Board Members would be limited to two consecutive terms.<sup>29</sup> The Barr-Tonko Bill seems to provide for neutral oversight.<sup>30</sup> How the USADA guards against conflicts of interest is not addressed.<sup>31</sup>

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<sup>23</sup> *Id.* § 5(b).

<sup>24</sup> *Id.* § 5(b)(1)–(2).

<sup>25</sup> *Id.* § 5(b)(4).

<sup>26</sup> *Id.* § 5(c).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* § 5(d).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 5(e).

<sup>31</sup> *See id.* § 5.

*D. Duties of the Anti-Doping Authority*

The Pitts Bill supplies less detail than the Barr-Tonko Bill regarding the duties of the anti-doping authority. As proposed under the Pitts Bill, the USADA is expressly tasked to:

- (a) develop and publish lists of banned and allowed substances, methods, and treatments;
- (b) create programs for education, research, testing, and adjudication; and
- (c) exclude from participation any violators of either federal or state anti-doping rules.<sup>32</sup>

In contrast, the Barr-Tonko Bill provides more specific detail regarding the duties of the anti-doping authority, identifying the duties of the new authority to include:

- (a) the development and publication of official lists of banned and allowed substances, methods, and treatments;
- (b) the development and publication of documents detailing testing procedures, standards, and protocols, as well as laboratory procedures and standards of accreditation;
- (c) the development and publication of documents detailing the investigational, charging, and adjudication procedures;
- (d) the development of programs for education, research, and testing; and
- (e) the exclusion of violators of federal or state anti-doping rules from participation in thoroughbred racing.<sup>33</sup>

*E. Powers of Newly Created Anti-Doping Authority*

The Pitts Bill supplies no detail regarding the express powers of the USADA anti-doping authority that is to be

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<sup>32</sup> H.R. 2641, 114th Cong. § 4(b)(1)(A)–(C) (2015).

<sup>33</sup> H.R. 3084, 114th Cong. § 6(a) (2015).

created.<sup>34</sup> Presumably, such powers will be set forth in the rules that would be promulgated by the USADA, if the Pitts Bill becomes law.<sup>35</sup> The Barr-Tonko Bill enumerates and sets forth the basic powers of the THADA, its contemplated anti-doping authority.<sup>36</sup> Specifically, these powers include:

- (a) access to the offices, track facilities, and businesses of all licensees;
- (b) the powers of search and seizure;
- (c) the ability to issue and enforce subpoenas (to compel persons to be questioned concerning alleged violations under oath), and subpoenas *duces tecum* (compelling the production of documents relevant to such an investigation by the authority); as well as
- (d) "other" investigatory powers. The scope and practice of these THADA powers are expected to be detailed in the rules to be promulgated if the Act is brought into force as law.<sup>37</sup>

#### *F. Doping Penalties*

The Pitts Bill, while providing fewer specifics, does reveal three features regarding the imposition of doping violation penalties.<sup>38</sup> Those factors are:

- (a) a "one and done" temporal exclusion penalty for the presence of any listed banned substance in a tested animal;
- (b) a "three strikes and you're out" temporal exclusion penalty for violations involving allowed substances that are found to have been administered in violation of the allowed pre-race window, and;

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<sup>34</sup> See H.R. 2641.

<sup>35</sup> See *id.*

<sup>36</sup> H.R. 3084 § 4(c).

<sup>37</sup> *Id.*

<sup>38</sup> H.R. 2641 § 4(b)(3)(A)–(C).

(c) reciprocal federal suspensions matching any temporal exclusion penalties imposed by State Racing Commissions pursuant to state law.<sup>39</sup> Notably, the Pitts Bill does not provide for any financial penalties for violators, nor does it require the return of purse monies in the event that a horse wins money while in violation of the rules.<sup>40</sup>

The anti-doping penalties and corresponding rule under the Barr-Tonko proposed legislation would impose punishment/penalties for the following:

- (a) the presence of prohibited substances in a sample even accidentally or without knowledge thereof (i.e., strict liability);
- (b) the attempted use of a prohibited substance;
- (c) the possession of prohibited substance or method;
- (d) any attempted possession of prohibited substance or method;
- (e) the administration of prohibited substance or method;
- (f) a refusal or failure to submit horse for testing without compelling justification;
- (g) the tampering with any doping control;
- (h) any attempted tampering with any doping control;
- (i) the trafficking of any prohibited substance or method;
- (j) any attempted trafficking of any prohibited substance or method, and;
- (k) complicity with any anti-doping violation (i.e., conspiracy).<sup>41</sup>

The specific categories and levels of penalty and punishment would likely be based on a system that would

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<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> H.R. 3084 § 7(c).

consider both mitigating and aggravating circumstances, as well as the licensee's record and the facts and circumstances surrounding each violation or combination of violations.<sup>42</sup> The THADA would be tasked with creating a uniform set of rules imposing sanctions against covered persons for anti-doping rule violations, and these must include the imposition of sanctions, up to and including lifetime bans from horseracing.<sup>43</sup>

### *G. Adjudication & Disciplinary Procedure*

The Pitts Bill fails to detail any disciplinary procedures.<sup>44</sup> Instead, it contemplates that such details will be established by way of rules to be promulgated by the USADA, subsequent to the Act being enacted.<sup>45</sup> Although not specifically stated, it is probable that the Pitts Bill, if successful, will adopt procedures of adjudicating and discipline from the Administrative Order and Procedures Act ("AOPA").<sup>46</sup> This would make good sense and likely result in a smoother transition in those areas, as many state commissions have adopted, in large part, the AOPA for adjudicating disciplinary proceedings.

Conversely, the Barr-Tonko Bill bases its rules, in this regard, largely on those employed by the USADA and international "best practices."<sup>47</sup> The Barr-Tonko Bill also sets forth the main components of disciplinary actions.<sup>48</sup> However, the specific mechanics of the adjudication and disciplinary procedures are left to be established by the future rules.<sup>49</sup> The listed disciplinary categories under the Barr-Tonko Bill do address the due process of law issue by mandating:

- (a) requirements for notification of rule violations;
- (b) hearing procedures;
- (c) burdens of proof and which party possesses them;

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<sup>42</sup> *See id.* § 7(f).

<sup>43</sup> *Id.*

<sup>44</sup> *See* H.R. 2641 § 4(c).

<sup>45</sup> *Id.*

<sup>46</sup> *See* 5 U.S.C. § 551 (2016); *see* H.R. 2641.

<sup>47</sup> H.R. 3084, 114th Cong. § 7(f) (2015).

<sup>48</sup> *Id.* § 7(c)-(f).

<sup>49</sup> *See id.*

- (d) presumptions;
- (e) evidentiary rules;
- (f) appeals process;
- (g) confidentiality and public reporting guidelines; and
- (h) due process of law requirements.<sup>50</sup>

#### *H. Preemption of State Law and Reciprocity Regarding State Law Violations*

These competing bills present diametrically opposed positions regarding the issue of preemption of state law. The Pitts Bill expressly provides that state laws would not be preempted by its enactment.<sup>51</sup> In direct contrast, the Barr-Tonko Bill provides for a new regime regarding anti-doping rules and regulations that would preempt state law on the same or similar subject matter.<sup>52</sup> Arguably, the Barr-Tonko Bill would provide greater uniformity for those participants owning, training, and running horses in multiple states.

The Pitts Bill is clear and expressly provides that the new federal law created in connection with, and pursuant to its authority, will recognize state law violations.<sup>53</sup> Further, the Pitts Bill contemplates that the association of new federal law(s) would enforce the participation ban instituted by state authorities via reciprocity.<sup>54</sup> In contrast, the Barr-Tonko Bill “occupies the field” as the sole, nationwide anti-doping authority, so there is no need to contemplate the issue of reciprocity regarding state law violations.<sup>55</sup>

#### *I. Delegation of Authority to State Commissions*

The Pitts Bill does not expressly address the issue of delegation of authority.<sup>56</sup> Should the Pitts Bill become law, it is probable that such delegated powers will be supplied by way of

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<sup>50</sup> *Id.* § 7(e).

<sup>51</sup> See H.R. 2641, 114th Cong. § 4 (2015).

<sup>52</sup> H.R. 3084 § 8.

<sup>53</sup> H.R. 2641 § 4(d)(1)(B).

<sup>54</sup> *Id.*

<sup>55</sup> H.R. 3084 § 9(1).

<sup>56</sup> See H.R. 2641.

future rules. In contrast, the Barr-Tonko Bill expressly states that the Authority, THADA, may enter into agreements (i.e., contracts) with State Racing Commissions to implement the strictures of the Act within that specific state.<sup>57</sup> Pursuant to the Barr-Tonko Bill, such agreements would remain terminable at the discretion of the newly established federal authority.<sup>58</sup>

### *J. Funding*

Funding is a key factor with any proposed legislation. Costs of staffing, implementation, enforcement, and testing are all significant, and both proposed bills address the issue.<sup>59</sup> Under the Pitts Bill, funding for the new federal program would derive from individual agreements between the USADA and racetracks that offer interstate wagering.<sup>60</sup> Whether or not there would be individually negotiated agreements bearing some commonality is not defined.<sup>61</sup> The Pitts Bill also does not explain how costs should be allocated among the various tracks or how the USADA should arrive at its annual horseracing anti-doping budgets.<sup>62</sup>

The Barr-Tonko Bill provides that the initial funding of the Authority is to be supplied by loans and/or donations secured by the THADA.<sup>63</sup> Once it is up and running, the bill requires the THADA to create a budget each year, with the first year's budget being subject to a supermajority vote of the Board (this would result in some of the Board Members from the horse racing industry being required to approve the budget).<sup>64</sup> In the event that any subsequent year's budget exceeds the previous year's budget by more than five percent, that budget must be passed by a supermajority of the THADA Board as well.<sup>65</sup>

On or before November 1st of this year (2016), and each subsequent year, the THADA would be required to produce

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<sup>57</sup> H.R. 3084 § 9(1).

<sup>58</sup> *Id.*

<sup>59</sup> H.R. 2641 § 5(b)(2); H.R. 3084 § 12.

<sup>60</sup> H.R. 2641 § 5(b)(2).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> H.R. 3084 § 12.

<sup>64</sup> *Id.* § 12(2).

<sup>65</sup> *Id.*

documents setting forth its estimated costs (for annual programs, plus the full payoff of any outstanding loans) on a per starter basis, in line with its approved annual budget.<sup>66</sup> This information would be supplied to each State Racing Commission, which would then calculate and pay its proportional share of the budget.<sup>67</sup> It is clear that funding, and lots of it, will be needed for operational and enforcement procedures under either bill. What is equally clear and certain is that the necessary subject of funds and funding will be a topic of intense debate with regard to both bills.

### *K. Federal Review*

The bills differ as to proposed and contemplated federal review. The Pitts Bill, as proposed, calls for no federal review for spending or efficacy.<sup>68</sup> Conversely, the Barr-Tonko Bill requires review of the newly created THADA.<sup>69</sup> Specifically, the Barr-Tonko Bill would require, in the third year of operation and every fourth year thereafter, that the Comptroller General supply Congress with a report evaluating the THADA's spending and efficacy.<sup>70</sup> Federal and/or Congressional review of the authority's spending and operations will be required, whether that authority be established by the Pitts Bill or Barr-Tonko Bill. It is likely that the Government Accountability Office ("GAO"), the federal agency that provides auditing, evaluation and investigative services for the United States Congress, would perform review and reporting.<sup>71</sup>

### *L. Public Notice & Comment Period for Rules to Be Promulgated*

Interestingly, the Pitts Bill directly addresses the issue of public notice and comment, but only with regard to the

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<sup>66</sup> *Id.* § 12(3).

<sup>67</sup> *Id.*

<sup>68</sup> H.R. 2641, 114th Cong. § 5(b)(2) (2015).

<sup>69</sup> *See* H.R. 3084, 114th Cong. (2015).

<sup>70</sup> *Id.* § 5(f).

<sup>71</sup> *About GAO, U.S. GOV'T ACCOUNTABILITY OFF.*, <http://www.gao.gov/about/index.html> (last visited Oct. 10, 2016) [<http://perma.cc/LL3N-KSG2>].

permitted/prohibited drugs lists.<sup>72</sup> In contrast, the Barr-Tonko Bill requires public comment on all aspects of its anti-doping program including, but not limited to, drug lists (subject to periodic reviews), types of rule violations, hearings, and sanctions.<sup>73</sup>

However, all federal rules are required to be promulgated with a prior, public notice and comment period so that stakeholders and interested parties may set forth their objections, criticisms, comments, and concerns to be considered by the federal rule makers, prior to enactment of new federal regulations.<sup>74</sup> Given the issue of race day administration of Lasix and the multitude of issues contained in both proposed bills, the time allotted for comments will need to be substantial, as many stakeholders and interested parties with varied positions and agendas will, no doubt, have plenty of comments. Regarding the issue of consultation and notice relative to the development of new federal rules, both acts are subject to a federal notice and comment period.<sup>75</sup> Additionally, both proposed bills contemplate rules developed with consultation from interested parties and stakeholders, including State Racing Commissions, race-hosting associations, and horsemen's groups.<sup>76</sup>

#### *M. Rule Promulgation Deadline*

Interestingly, the Pitts Bill states that new rules are to be published within one year of enactment of the law.<sup>77</sup> The Barr-Tonko supplies more detail, stating that the lists of permitted and prohibited substances and methods shall be published by January 1, 2017.<sup>78</sup> The Barr-Tonko Bill also provides that modification of this initial list must be effective within 120 days of the enactment of the Act, and that the lists of prohibited and allowed substances and methods are subject to periodic review

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<sup>72</sup> H.R. 2641 § 4(e)(1).

<sup>73</sup> H.R. 3084 § 7(e).

<sup>74</sup> 5 U.S.C. 551, §§ 551–559 (2016).

<sup>75</sup> *Id.*

<sup>76</sup> H.R. 3084 § 7(e). *See* H.R. 2641 § 4(e)(1).

<sup>77</sup> H.R. 2641 § 4(c).

<sup>78</sup> H.R. 3084 § 7(b)(2).

and modification, after an appropriate public/industry notice and comment period.<sup>79</sup>

#### *N. Testing to Be Performed By*

Significantly, the Pitts Bill does not address the issue of testing, or who should perform it, at all.<sup>80</sup> Based on current law, federal regulation will, at a minimum, require accredited laboratories that demonstrate they can perform standard, defined procedures for such tasks as collection, storage and transfer, and testing of serum and urine samples.<sup>81</sup> Presumably, this subject will be addressed, clarified, and specified as the Pitts Bill makes its way through the legislative process. In contrast, the Barr-Tonko Bill expressly states that such testing is to be performed by independent, THADA-accredited laboratories, pursuant to the procedural rules to be promulgated once the Act is passed.<sup>82</sup> While Barr-Tonko more specifically addresses the issues of how, by whom, and when testing will be performed, it does leave open areas for future discussion and specification.<sup>83</sup>

#### *O. Reduction in Penalty for Cooperation and Informing*

The Pitts Bill states that the new federal Anti-Doping Authority may suspend a violator's period of exclusion if the violator cooperates and supplies "substantial assistance" regarding other violations of the Act's anti-doping rules or any state or federal law.<sup>84</sup> However, it does not outline or include any details or specifics regarding how this "flip" provision will function or be limited.<sup>85</sup> Presumably, the first to provide this "substantial assistance" will receive the most benefit. Consistency under such an approach is usually problematic, but may be unavoidable for overall enforcement.

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<sup>79</sup> *Id.*

<sup>80</sup> See H.R. 2641 § 4(b).

<sup>81</sup> See H.R. 2641.

<sup>82</sup> H.R. 3084 § 7(d).

<sup>83</sup> See *id.*

<sup>84</sup> H.R. 2641 § 4(d)(1).

<sup>85</sup> See *id.*

The Barr-Tonko Bill supplies more detail, setting forth that the new federal law will follow the sanction elimination and reduction policies found in the USADA Anti-Doping Protocol.<sup>86</sup> Based on the USADA Anti-Doping Protocol, one would expect that the following leniency factors would apply to federal Thoroughbred racing violations:

- (a) lack of fault, as where prohibited substance was introduced accidentally, through sabotage, contamination, mislabeling, etc.;
- (b) a violator's rendering of substantial assistance in identifying other violations;
- (c) immediate acknowledgment of violation when confronted; and
- (d) disclosure of violation prior to collection of evidence thereof.<sup>87</sup>

The Barr-Tonko Bill framework does provide more substantive guidance than the competing Pitts Bill in this regard. However, the key to integrity and enforcement is, and will be, in consistency, uniformity, and fairness.

#### *P. Rules Regarding Furosemide*

The Pitts Bill sets forth express policies regarding usage of Furosemide, presumably within twenty-four hours of a race (see Race Day Medications above), though the bill does not say so.<sup>88</sup> Specifically, during the first two years following the Act becoming law, Furosemide could be used only under three circumstances: (1) the horse is 3 years old, or older; (2) the use complies with the ARCI-011-020 "Medications and Prohibited Substances" requirements; and (3) administration of this substance occurred as part of the veterinary care of the animal.<sup>89</sup>

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<sup>86</sup> H.R. 3084 § 7(b)(1).

<sup>87</sup> *Protocol for Olympic and Paralympic Movement Testing*, U.S. ANTI-DOPING AGENCY 1, 33-37 [http://www.usada.org/wp-content/uploads/USADA\\_protocol.pdf](http://www.usada.org/wp-content/uploads/USADA_protocol.pdf) (last visited Oct. 23, 2016) [<https://perma.cc/5KTK-PH95>].

<sup>88</sup> H.R. 2641 § 4(f).

<sup>89</sup> *Id.*

Most notable of these requirements is that by incorporating the Principles of Veterinary Medical Ethics into the bill, only those horses that are demonstrated “bleeders” would be eligible for Furosemide, as those standards require a diagnosis of an ailment prior to any treatment.<sup>90</sup> In contrast, the Barr-Tonko Bill is tacit on this issue, which is both interesting and problematic. The timing and circumstances surrounding the use of Furosemide are key issues in not only Thoroughbred racing but also Quarter Horse and Standardbred racing as well.<sup>91</sup> For the Barr-Tonko Bill to be successful it will need to address, with specificity, the issue of Furosemide, which continues to be contentious.<sup>92</sup> There are meritorious positions on both sides of this issue and the future of race-day administration of Furosemide will be a difficult and contested issue relative to proposed legislation.<sup>93</sup>

#### *Q. Breed Registration Requirement*

The Pitts Bill contains references to any breed registry requirement.<sup>94</sup> In contrast, the Barr-Tonko Bill only applies to Thoroughbreds.<sup>95</sup> As such, only those Thoroughbred horses that are registered with The Jockey Club would be subject to the THADA’s jurisdiction.<sup>96</sup>

#### *R. Effect on Off-Track Wagers*

The Pitts Bill states that, after enactment of the Act, off-site wagers conducted by host racing associations, and/or accepted by off-track betting systems, are allowed only with consent of the newly formed federal Anti-Doping Authority.<sup>97</sup> The

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<sup>90</sup> *Id.* §§ 2(4), 4(f).

<sup>91</sup> See Daniel Ross, *Lasix: the drug debate which is bleeding US horse racing dry*, THE GUARDIAN (Aug. 31, 2014, 7:00), <https://www.theguardian.com/sport/2014/aug/31/lasix-drug-debate-bleeding-horse-racing> [https://perma.cc/4CSA-W4MA].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See H.R. 2641, 114th Cong. § 4 (2015).

<sup>95</sup> H.R. 3084, 114th Cong. § 3(3) (2015).

<sup>96</sup> *Id.* § 3(16).

<sup>97</sup> H.R. 2641 § 4(a).

Barr-Tonko Bill would expressly govern races that are subject to interstate, off-track wagering.<sup>98</sup>

*S. Temporal Scope of the New Laws*

The temporal scope of the newly created law is an issue not addressed by the Pitts Bill. The competing Barr-Tonko Bill does address these issues. The Barr-Tonko Bill, as proposed, would be solely prospective in nature.<sup>99</sup> As such, if the Barr-Tonko Bill becomes law, it would address and apply only to those violations occurring after it becomes effective and enforceable.<sup>100</sup> All violations that occurred prior to the enactment of the Barr-Tonko Bill would be controlled by applicable state law and industry rules.<sup>101</sup>

### III. ANALYSIS

Proponents of both the Barr-Tonko Bill and Pitts Bill support the national or federal regulation of horseracing, and include long-term industry leaders such as The Jockey Club.<sup>102</sup> The proponents largely base their position and support of the legislation on the need for uniformity of two things: (1) a uniform horseracing medication program and (2) uniformity in testing laboratories.<sup>103</sup> Proponents argue that uniformity would promote safety and enhance public confidence in the integrity of the sport.<sup>104</sup>

Opponents include industry leaders such as the Horsemen's Benevolent and Protective Association and the

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<sup>98</sup> H.R. 3084 § 4(b).

<sup>99</sup> *Id.* § 6(c).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> T.D. Thornton, *What's Next for Competing Anti-Doping Bills*, THOROUGHBRED DAILY NEWS (July 21, 2015), <http://www.thoroughbreddailynews.com/whats-next-for-competing-anti-doping-bills/> [<https://perma.cc/C67E-AS7L>].

<sup>103</sup> *See id.* *See also National Uniform Medication Program*, RACING MEDICATION & TESTING CONSORTIUM, <http://rmtcnet.com/national-uniform-medication-program/> (last visited Oct. 14, 2016) [hereinafter RACING MEDICATION] [<https://perma.cc/DW7F-UATD>].

<sup>104</sup> *See id.*; *see* Thornton, *supra* note 102.

Association of Racing Commissioners International.<sup>105</sup> The former operates on behalf of Thoroughbred racehorse owners, trainers, and backstretch personnel throughout the United States and Canada.<sup>106</sup> The latter is the only umbrella organization of the official governing and rule making bodies for professional horse racing in North America and parts of the Caribbean.<sup>107</sup> As such, it sets standards for racing regulation, medication policy, and drug testing laboratories.<sup>108</sup>

Those on the opposing side of this legislation argue three things. First, generally speaking, there is already uniformity of horseracing medication programs and laboratories.<sup>109</sup> This is evidenced by the fact that all thirty-eight states that presently have racing programs also have a state agency governing racing and the rules that prohibit a horse from competing with performance-enhancing medications.<sup>110</sup> They argue that the lack of uniformity in medication programs exists in the area of therapeutic medications.<sup>111</sup> There is a general consensus as to those therapeutic medications that are to be allowed with differences existing in withdrawal times and threshold levels.<sup>112</sup> Second, there is already an adequate accreditation process for laboratories, and all thirty-eight state programs have access to testing done by accredited labs.<sup>113</sup> Third, the proposed anti-doping bills are a violation of the Tenth Amendment of the U.S. Constitution.

Opponents argue that any federal attempt or regulation over states, as proposed by either anti-doping bills, runs afoul of the Tenth Amendment, which states: “The powers not delegated

<sup>105</sup> Thornton, *supra* note 102.

<sup>106</sup> NAT'L HORSEMEN'S BENEVOLENT & PROTECTIVE ASS'N, <http://nationalhbpa.com/about-hbpa/> (last visited Oct. 14, 2016) [<https://perma.cc/4XJJ-Q6CD>].

<sup>107</sup> ASS'N OF RACING COMM'R INT'L, <http://www.arci.com/> (last visited Oct. 14, 2016) [<https://perma.cc/458M-Q3VR>].

<sup>108</sup> *Id.*

<sup>109</sup> See Daniel Ross, *Standard issue: drug testing far from uniform in American horse racing*, THE GUARDIAN (Sept. 16, 2015), <https://www.theguardian.com/sport/2015/sep/16/standard-issue-drug-testing-far-from-uniform-in-american-horse-racing> [<https://perma.cc/S6R3-5JJZ>].

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *Id.*

to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>114</sup> I believe there are several troubling issues with both proposed anti-doping bills. The first is the proposed involvement of the USADA and its ability to handle the volume of work it would be required to assume, based on the way both bills are written. Although the USADA has been largely effective in testing human athletes, equine athletes, in both size and scope, present far different challenges than testing a group of Olympic pole-vaulters.

Let's start with the sheer number of races. There are more than 96,000 horse races run each year in the United States.<sup>115</sup> The winner of each race is tested, and that testing includes both urine samples and blood serum samples.<sup>116</sup> The number of tests currently performed on equine athletes exceeds 300,000 per year.<sup>117</sup> The USADA presently conducts less than 10,000 tests per year,<sup>118</sup> which equates to less than one-thirtieth of the number of drug tests that are being performed annually on racehorses. This raises a serious question as to how the USADA will accommodate the dramatic increase in numbers while, at the same time, conducting the necessary research and testing to target the ever-evolving designer drugs and compounds that are allegedly being used by industry cheaters. Opponents maintain the USADA will not do so effectively.

A second issue of concern is how the World Anti-Doping Code (“WADC”) will be implemented, should either of the proposed anti-doping bills become law. The WADC allows participants to apply for permission to use certain otherwise

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<sup>114</sup> U.S. CONST. amend. X.

<sup>115</sup> *Drug Testing By The Numbers*, HARNESSRACING (Aug. 14, 2013), <http://www.harnessracing.com/news/drugtestingbythenumbers.html> [<https://perma.cc/EZ7F-7RAX>].

<sup>116</sup> Gov. Edmund G. Brown Jr., *CHRB Drug Testing and Enforcement*, CAL. HORSE RACING BD. 1, [http://www.chrb.ca.gov/misc\\_docs/drug\\_testing\\_enforcement\\_process.pdf](http://www.chrb.ca.gov/misc_docs/drug_testing_enforcement_process.pdf) [<https://perma.cc/Q6QM-CFDW>].

<sup>117</sup> HARNESSRACING, *supra* note 115.

<sup>118</sup> *Id.*

prohibited substances.<sup>119</sup> This application process, filed by or on behalf of the athlete, seeks a Therapeutic Use Exemption (“TUE”).<sup>120</sup> The TUE provides the athlete special permission to use an otherwise prohibited medication or substance.<sup>121</sup> A recent example of a high profile athlete applying for and receiving a TUE is Olympic Gold Medal Gymnast, Simone Biles, who received a TUE that allowed her to compete while continuing to take her ADHD medication.<sup>122</sup> Significantly, approximately eight out of ten athletes applying for a TUE are favorably considered.<sup>123</sup> Neither proposed bill contemplates, nor will there be, a TUE for the equine athlete.<sup>124</sup>

The issue of and desire for uniformity is a key objective of those on both sides of this issue. Supporters of the Barr-Tonko Bill and/or the Pitts Bill believe an independent, non-governmental anti-doping authority charged with implementing a National Uniform Medication Program (“NUMP”) is the solution. Proponents of those bills point to the fact that despite development of a NUMP, only eleven states have fully adopted the same while the remaining states operate under their own specific rules.<sup>125</sup> Opponents of the proposed anti-doping bills argue the existing NUMP, together with a list of permissible therapeutic medications and recommended withdraw times and thresholds, is adequate.<sup>126</sup> Additionally, opponents of the bills

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<sup>119</sup> *Therapeutic Use Exemptions*, WORLD ANTI-DOPING AGENCY 1, 13 (Nov. 20, 2015), <http://www.usada.org/wp-content/uploads/WADA-ISTUE.pdf> [https://perma.cc/2H49-3JYM].

<sup>120</sup> *Id.* at 1.

<sup>121</sup> *Id.*

<sup>122</sup> H. G., *A doper’s dupe?: How athletes can use medical exemptions to beat drug testers*, THE ECONOMIST BLOG (Sept. 19, 2016), <http://www.economist.com/blogs/gametheory/2016/09/doper-s-dupe> [https://perma.cc/66GB-MZ5T].

<sup>123</sup> *2015 USADA Annual Report*, U.S. ANTI-DOPING AGENCY 1, 31 (2015), [http://www.usada.org/wp-content/uploads/2015\\_annual\\_report.pdf](http://www.usada.org/wp-content/uploads/2015_annual_report.pdf) [https://perma.cc/7V48-HQK3].

<sup>124</sup> H.R. 3084, 114th Cong. (2015). See H.R. 2641, 114th Cong. (2015).

<sup>125</sup> *National Uniform Medication Program Update Thoroughbred Racing – As of September 15, 2016*, RACING MEDICATION & TESTING CONSORTIUM 1, <http://rmtcnet.com/wp-content/uploads/2016/09/NUMP-Policy-Adoption-by-State-handle-and-races-September-15-2016.pdf> (last visited Oct. 23, 2016) [https://perma.cc/E78V-QJ5Y].

<sup>126</sup> *ARCI, NHBPA Express Opposition To Proposed Horseracing Integrity Act*, PAULICK REPORT (July 16, 2015), <http://www.paulickreport.com/news/the-biz/arci>

argue that accredited laboratories are currently performing testing and that what is really needed is unity among industry leaders.<sup>127</sup> Unity, argue the opponents, will result in desired uniformity.<sup>128</sup>

#### IV. CONCLUSION

The appropriate compromise is a middle-ground agreement by and between existing state regulators. For example, multiple states could form a compact agreement that would universally prohibit *all* performance enhancing medications, yet allow for certain therapeutic medications that would have defined thresholds and withdraw times. This would eliminate confusion for owners, trainers, veterinarians, regulators, and horsemen that compete in multiple states.

With that said, passage of either proposed anti-doping bill in its current form is unlikely. Data from the Association of Racing Commissioners International indicate that approximately four percent of its members support either bill.<sup>129</sup> The Jockey Club member support is approximately ten percent.<sup>130</sup> Further, the government transparency organization, GovTrack, gives the Barr-Tonko and Pitts Bills a five percent and three percent chance of getting past committee and a two percent and one percent chance of being enacted, respectively.<sup>131</sup>

However, and this is a big however, a nationally televised tragedy such as Barbaro or Eight Belles in a graded stakes race could change that figure and shift support to more regulation overnight. Because of this, compromise, including an exchange of ideas and the ongoing development of specific regulations should remain a critical goal of everyone in the horse racing industry.

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expresses concern over proposed horseracing integrity act/  
UFMK].

[<https://perma.cc/RDA7-UFMK>].

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Eric Mitchell, *2016: Year of Unification*, BLOODHORSE (Dec. 23, 2015, 6:43 PM), <http://cs.bloodhorse.com/blogs/wgoh/archive/2015/12/23/2016-year-of-unification.aspx> [<https://perma.cc/C346-T35Q>].

<sup>130</sup> See generally James L. Gagliano, *Coalition for Horse Racing Integrity*, THE JOCKEY CLUB, <http://www.jockeyclub.com/default.asp?section=RT&year=2015&area=12> (last visited Oct. 23, 2016) (stating that 1200 individuals have signed on to support WHOA) [<https://perma.cc/ZD5Z-RZBE>].

<sup>131</sup> Thornton, *supra* note 102.

Ultimately, it is up to all those who participate in and benefit from the sport to increase public confidence, improve participation, ensure animal safety and welfare, and maintain integrity in the sport of horse racing.

**Table 1.** Pitts vs. Barr-Tonko Bills: A Comparison Guide

	<b>Pitts</b>	<b>Barr-Tonko</b>
<b>Name</b>	<i>The Horseracing Integrity and Safety Act of 2015</i> (“HR 2641”)	<i>The Thoroughbred Horseracing Integrity Act of 2015</i> (“HR 3084”)
<b>Applies To</b>	Thoroughbred, Quarter Horse, and Standardbred racing.	Thoroughbred racing only.
<b>Primary Focus</b>	Proposes a ban on providing medications within twenty-four hours of a race, and a "three strikes and you're out" penalty.	Proposes provisions based, in part, on United States Anti-Doping Agency (“USADA”) Protocol and its attached World Anti-Doping Code Articles (“WADCA”). Proposes to use existing industry "best-practices" to create a uniform anti-doping program along the lines of the one used in human sports.
<b>Oversight Authority</b>	An independent Anti-Doping Authority that would regulate interstate horseracing at the federal level.	A Thoroughbred Horseracing Anti-Doping Authority (“THADA”) comprised of owners, breeders, trainers, vets, racing associations, and jockeys.
<b>Veterinary Ethics</b>	Mandates that all drug treatments adhere to the Principles of Veterinary Medical Ethics of the American Veterinary Medical Association (“AVMA”) that are in effect on the date the bill becomes law. It would take an	Does not require adherence to the standards of veterinary ethics unless required by the THADA.

	<b>Pitts</b>	<b>Barr-Tonko</b>
	act of Congress to make changes when the AVMA modifies its Principles from time to time.	
<b>Race-day Medication</b>	No medication can be administered within a 24-hour window before a race. Medication administered more than twenty-four hours before a race is acceptable, even if it is still in the horse's bloodstream during the race.	Tacit on the issue of whether or not to ban the administration of medications on race-day or go further and ban medications that may have an effect on a horse on race-day. This issue is left to the discretion of the THADA.
<b>Character of New Anti-Doping Authority</b>	Designates the USADA as the independent anti-doping organization to regulate interstate horseracing at the federal level. Is vague on the details.	Supplies detailed guidance about the non-profit authority to be created by the THADA.
<b>Duties of the Anti-Doping Authority</b>	Leaves it up to the USADA to develop lists of banned and allowed substances, methods and treatments, create educational, research, and testing programs, and address violations.	Outlines very specific details about the duties of the anti-doping authority.
<b>Powers of the Anti-Doping Authority</b>	Offers no detail regarding the powers of the USADA Anti-Doping Authority.	Sets forth the basic powers of the THADA. Specifically, these powers include: (a) access to the offices, track facilities, and businesses of all licensees; (b) the powers of search and seizure; (c) the ability to issue and enforce subpoenas (to compel persons to be questioned concerning alleged

	<b>Pitts</b>	<b>Barr-Tonko</b>
		violations under oath), and subpoenas <i>duces tecum</i> (compelling the production of documents relevant to such an investigation by the authority); as well as, (d) "other" investigatory powers.
<b>Doping Penalties</b>	Includes three factors but no financial penalties, including no return of the purse. (1) A "one and done" temporal exclusion penalty for the presence of any listed banned substance in a tested animal; (2) a "three strikes and you're out" temporal exclusion penalty for violations involving allowed substances that are found to have been administered in violation of the allowed pre-race window, and; (3) reciprocal federal suspensions matching any temporal exclusion penalties imposed by State Racing Commissions pursuant to state law.	Imposes punishment/penalties for 11 areas of violation. The THADA would be tasked with creating a uniform set of rules imposing sanctions against covered persons for anti-doping rule violations and they must include the imposition of sanctions up to and including lifetime bans from horseracing.
<b>Adjudication and Disciplinary Procedure</b>	Fails to detail any disciplinary procedures, noting that the USADA will establish them if the bill is enacted. It's likely the discipline from the Administrator Order and Procedures Act will be used.	Bases its rules largely on those employed by the USADA and international best practices. Sets forth the main components of disciplinary actions, however, the specific mechanics of the adjudication and

	<b>Pitts</b>	<b>Barr-Tonko</b>
		disciplinary procedures are left to be established by the future rules.
<b>Preemption of State Law and Reciprocity Regarding State Law Violations</b>	Expressly provides that state laws would not be preempted by its enactment.	Provides for a new regime regarding anti-doping rules and regulations that would/will preempt state law on the same or similar subject matter.
<b>Delegation of Authority to State Commissions</b>	Does not address the issue of delegation of authority.	States that the THADA may enter into agreements (i.e., contracts) with State Racing Commissions to implement the strictures of the Act within that/those state(s) specific jurisdiction(s).
<b>Funding</b>	Funding for the new federal program would derive from individual agreements between the USADA and the racetracks that offer interstate wagering. Whether there would be individually negotiated agreements bearing some commonality or not, is not addressed. The Pitts Bill does not describe how costs should be allocated among the various tracks or how the USADA should arrive at its annual horseracing anti-doping budgets.	Initial funding of the THADA is to be supplied by loans and/or donations secured by the THADA. Once it is up and running, the bill requires the THADA to create a budget each year, with the first year's budget being subject to a supermajority vote of its board.
<b>Federal Review</b>	No federal review for spending or efficacy.	In the third year of operation and every fourth year thereafter, the

	<b>Pitts</b>	<b>Barr-Tonko</b>
		Comptroller General would supply congress with a report evaluating the THADA's spending and efficacy.
<b>Public Notice and Comment Period for Rules to Be Promulgated</b>	Requires public and industry comment with regard to the permitted/prohibited drugs lists only.	Requires public comment on all aspects of its anti-doping program including, without limitation, drug lists (including periodic reviews), and types of rule violations, hearings, and sanctions.
<b>Rule Promulgation Deadline</b>	New rules are to be published within one year of enactment of the law.	The lists of permitted and prohibited substances and methods would be published by January 1, 2017, with additional enforcement details.
<b>Testing to Be Performed By</b>	The bill does not address this issue.	Testing is to be performed by independent, THADA-accredited laboratories, pursuant to the procedural rules to be promulgated once the Act is enacted.
<b>Reduction in Penalty for Cooperation and Informing</b>	The new federal Anti-Doping Authority may suspend a violator's period of exclusion if the violator cooperates and supplies "substantial assistance" regarding other violations of the Act's anti-doping rules, or any state or federal law.	Provides details related to the requirement that federal law will follow the sanction elimination and reduction policies found in the USADA Anti-Doping Protocol.
<b>Rules Regarding Furosemide</b>	Sets forth specific policies. During the first two years following entry of the Act becoming law, Furosemide	Makes no express mention of Furosemide, leaving the question of its usability and timing up to the THADA.

	<b>Pitts</b>	<b>Barr-Tonko</b>
	could be used only under three circumstances: (1) the horse is 3 years old, or older; (2) the use complies with the ARCI-011-020 "Medications and Prohibited Substances" requirements; and (3) administration of this substance occurred as part of the veterinary care of the animal.	
<b>Breed Registration Requirement</b>	Covers Thoroughbreds, Standardbreds, and Quarter Horses.	Covers only Thoroughbreds.
<b>Effect on Off-Track Wagers</b>	After enactment of the Act, off-site wagers conducted by host racing associations, and/or accepted by off-track betting systems, are allowed only with consent of the newly formed federal Anti-Doping Authority.	Vague and without detail. States only that this federal law would expressly cover races that are the subject of interstate, off-track wagers.
<b>Temporal Scope of the New Laws</b>	Not addressed.	Applies only to those violations occurring after the Bill became effective and enforceable. All violations that occurred prior to the enactment of the Barr-Tonko Bill would be controlled by applicable state law and industry rules.