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June 3, 2016

Via Hand Delivery
Mr. Tony Glover, Director
Division of Pari-Mutuel Wagering
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-1035

Re: Florida Quarter Horse Racing Association/Hialeah

Dear Mr. Glover:

This firm represents the Florida Quarter Horse Racing Association ("FQHRA"). The FQHRA is designated by statute and charged with specific statutory responsibilities set forth in Sections 550.002(11), 551.104(10)(a)2. and 849.086(13)(d)3., Florida Statutes. The FQHRA's statutory duties include entering into agreements on behalf of racing quarter horse owners and trainers which govern quarter horse permitholders' payments of purses on quarter horse races pursuant to Sections 551.104(10)(a)2. and 849.086(13)(d)3., Florida Statutes, and representing the interests of racing quarter horse owners and trainers relative to determining the schedule of live racing as a prerequisite to additional gaming at quarter horse owners permitholders' locations as provided in Section 550.002(11), Florida Statutes. The FQHRA has been recognized in administrative hearings in this state to represent these interests.

The purpose of this letter is to advise the Division that its issuance of an annual racing license ("Annual License") and cardroom license to South Florida Racing Association, LLC d/b/a Hialeah Park (hereinafter "Hialeah"), on March 15, 2016, was improperly based on an unadopted non-rule policy that interprets Sections 550.002(11), 849.086(13) and 551.104(10), Florida Statutes. The issuance of these licenses is predicated upon the Division's acceptance of an unprecedented, captive Horsemen's Agreement between Hialeah and a newly formed entity, the South Florida Quarter Horse Association, Inc. ("SFQHA"). Through the issuance of these

licenses, the Division has implemented and communicated a new policy of general applicability to all quarter horse permitholders which reflects significant policy changes that will dramatically alter pari-mutuel wagering in this state. These policy changes and new interpretations have not been promulgated as rules as required by Section 120.54, Florida Statutes. As will be explained in more detail below, the new policies effectively authorize pari-mutuel permitholders to obtain annual racing licenses, cardroom licenses, and slot machine licenses without arms-length, good faith negotiations with the representatives of the horsemen. For the first time ever, the Division is allowing pari-mutuel permitholders to proceed with dictating racing dates and controlling additional gaming revenues based on an agreement with a captive horsemen's association created at the whim of the individual pari-mutuel facility. Individual facilities will be able to control the disbursement of revenues generated by wagering on the horse races as well as other gaming activities without any true input from a representative of an independent horsemen's association contrary to the established policy and intent of Florida's pari-mutuel statutes.

I. Hialeah's Relationship With FQHRA

"Quarter horse racing is part of the long established pari-mutuel racing industry in Florida which dates back to the 1930's." See Florida Quarter Horse Racing Ass'n., Inc. v. DBPR, Case No. 11-5796 p. 11 (DOAH May 6, 2013). After a hiatus in racing during the 1990's, efforts to reestablish quarter horse racing in Florida were initiated in the summer of 2005. The American Quarter Horse Association ("AQHA") was integrally involved in encouraging these efforts and generating a renewed interest in quarter horse racing in Florida. Id. at p. 12. The FQHRA was established as an affiliate to work in conjunction with the AQHA in Florida.

Shortly thereafter, Hialeah sought, and the Division issued, a new pari-mutuel quarter horse permit authorizing Hialeah to conduct quarter horse racing beginning in fiscal year 2009-2010. Since Hialeah began operating as a quarter horse permitholder, the FQHRA, an AQHA affiliate, has represented the interests of the majority of the horsemen at Hialeah. In 2010, FQHRA and Hialeah entered into several separate year-long "Memorandum of Agreements" governing the conduct of live race meets for quarter horses at Hialeah, including the allocation and distribution of purse money for each racing season through fiscal year 2015-2016. The Memorandum of Agreement between FQHRA and Hialeah for the 2015-2016 racing season is still in effect **and does not expire until June 30, 2016** (hereinafter the "Current Agreement"). Pursuant to the Current Agreement, FQHRA and Hialeah expressly agreed that "FQHRA is the organization recognized to represent participants who own and/or train Quarter Horses participating in a Quarter Horse Race Meeting at Hialeah or to represent the majority of the horsemen participating in a Quarter Horse Race Meeting at Hialeah." During the approximately seven year relationship between FQHRA and Hialeah, there has not been any question that FQHRA represented the interests of the majority of the horsemen at Hialeah.

II. Hialeah Licenses

In December 2015, while the Current Agreement with FQHRA was still in effect, Hialeah filed applications with the Division for an annual racing date license and cardroom license for the next racing season. In its application, Hialeah requested authorization to run 36 performances, which is less than a "full schedule of live racing" as defined in Section 550.002(11), Florida Statutes. Section 550.002(11), provides, in pertinent part, that:

> . . . for a quarter horse permitholder at its facility unless an alternative schedule of at least 20 live regular wagering performances is agreed upon by the permitholder and either the Florida Quarter Horse Racing Association or the horsemen's association **representing** the majority of the quarter horse owners and trainers at the facility and filed with the division along with its annual date application . . . the conduct of at least 40 live regular wagering performances. [Emphasis added.]

Sections 551.104(10) and 849.086(13), also mandate that a track seeking an annual slot machine license and cardroom license must have a purse agreement with either the FQHRA or an alternative horsemen's association representing the majority of the quarter horse owners and trainers at the facility on file with the Division. Because the FQHRA was the organization representing horsemen at Hialeah at the time the applications were filed, Hialeah was required to submit written consent from the FQHRA. Instead of complying with this requirement, Hialeah tried to circumvent the statutory requirement by claiming a newly formed entity met the requirements of the applicable statutes as an alternative horsemen's association even though the newly formed entity did not represent the majority of horsemen racing at Hialeah at the time. Hialeah apparently believes that it can prospectively establish a captive horsemen's association to meet its statutory requirements under its application for the Annual License. This is a drastically new approach that undermines the legislative policy of coupling expanded gaming with vibrant horse racing.

In spite of the long-standing recognition of FQHRA as the representative of the majority of the horsemen at Hialeah as confirmed by the Current Agreement, Hialeah did not obtain consent from FQHRA or any other horsemen's association to run less than a full schedule of live racing at the time that it submitted its applications in December 2015. Subsequently, on March 15, 2016, Hialeah transmitted to the Division an agreement dated March 14, 2016, between it and an entity that was formed that day claiming that such agreement satisfies Sections 550.002(11), 551.104(10) and 849.086(13). The transmittal letter submitted to the Division forwarding the SFQHA Agreement stated:

> Enclosed is the Horsemen's Agreement (the "Agreement"), executed by South Florida Racing Association, LLC ("SFRA"), and South Florida Quarter Horse Association, Inc. The Agreement, which becomes effective once the purse agreement currently on file with the Division is no longer effective, is being filed pursuant to §§550.002(11), 551.104(10), and 849.086(13), Fla. Stat.

The SFQHA Agreement provided, in pertinent part, that:

> WHEREAS, because only horses owned by members of the SFQHA **will be** eligible to participate in races during the race meet, **the SFQHA is the horsemen's association that represents all of the horse owners and trainers at [Hialeah's] facility who will participate** in the live quarter horse events that **will be conducted** by Hialeah at Hialeah Park during the race meet to which this Agreement is applicable.
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> ***
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> 1. Hialeah presently has on file with the Division a horsemen's agreement, the term of which agreement expires on June 30, 2016 (the "Filed Agreement"). . . . This Agreement shall become effective immediately upon the occurrence of either the expiration of the Filed Agreement on June 30, 2016. . . . It is the intent of the parties that this Agreement shall not be effective during the time that the Filed Agreement remains in effect.
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> ***
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> 13. For and in consideration of the purse payments that Hialeah has agreed to make as provided in paragraph 4 above, Hialeah agrees that it will accept entries during the Race Meet only from owners and/or trainers: (a) that appear on the membership roll of the SFQHA as a member in good standing; and (b) that have on file with Hialeah a photocopy of an executed original "Pledge Card" . . . whereby said owner and/or trainer has appointed the SFQHA to represent said owner and/or trainer for the purposes stated in §550.002(11); §551.104(10); §849.086(13), and the IHA [Interstate Horseracing Act of 1978]. [Emphasis added.]

It is indisputable that the SFQHA was not the representative horsemen's association of the majority of horsemen at Hialeah as of the date Hialeah submitted applications for its Annual License or the cardroom license or even on March 15, 2016, the date such licenses were issued. To the contrary, the SFQHA Agreement indicates that SFQHA will represent the majority of the owners and trainers once the race meet begins in June of 2017. The FQHRA contends this attempt to prospectively create a captive horsemen's group for the future races does not meet the statutory requirements. The Division's acquiescence to this effort by pari-mutuel permitholders to squeeze out an independent horsemen's group represents a significant new policy interpretation, which cannot be implemented without rulemaking.

Upon receipt of the SFQHA Agreement on March 15, 2016, the Division issued Hialeah its Annual License to race less than a full schedule of live racing as well as issued Hialeah's cardroom license. The Division issued such licenses despite the FQHRA's communications and the clear documentation that: (1) the SFQHA is not currently the horsemen's association representing the majority of the horsemen at Hialeah; (2) the SFQHA was formed essentially contemporaneously with it entering into a horsemen's agreement with Hialeah which would not

be effective until July 1, 2016; (3) the SFQHA is a captivate horsemen's association in that only members of SFQHA will be allowed to race at Hialeah; and (4) that, to date, no horseman has raced at Hialeah as a member of the SFQHA. In essence, the Division has authorized Hialeah to run less than a full schedule of live racing and continue its cardroom and slot machines operations in reliance on a horsemen's agreement which is not yet effective and which horsemen's association will not have any members who have run races at Hialeah as a member of SFQHA until races begin in June 2017.

In issuing the Annual License and cardroom license to Hialeah, the Division has implemented and communicated significant new statutory interpretations and policies without statutorily required rulemaking, including:

1. Section 550.002(11) specifically requires consent from FQHRA or the horsemen's association "representing the majority of the quarter horse owners and trainers at the facility" for the first time the Division is allowing this provision to be interpreted and applied in a prospective manner to allow the consent from a horsemen's association that has not in the past, and does not at the time of application for annual licensure, but will possibly represent the majority of the horsemen sometime in the future to meet the mandate in Section 550.002(11), as well as, Sections 849.086(13) and 551.104(10).

2. For purposes of the agreements required by Sections 550.002(11), 849.086(13) and 551.104(10), an agreement between the permitholder track and a captive horsemen's association is sufficient to meet the requirements of those statutes in derogation of the long-standing tradition that the horsemen's associations are associations formed and run independently from the track so as to protect the interests of the horsemen.

By allowing the monumental shift in the relationship between a permitholder and the representations of the horsemen who participate in the required racing, the Division is effectively adopting a new statement of general applicability that implements, interprets or prescribes law or policy. The Division is negating the long-established role of an independent horsemen's group as an integral partner in the continuation of established pari-mutuel wagering and additional forms of gaming. These statements constitute an unadopted rule in that they are agency statements that meet the definition of the term "rule" but have not been adopted pursuant to the requirements of s. 120.54. The end result is contrary to the clear legislative interest. The FQHRA was one of the successful challengers to attempts to introduce barrel racing as a new form of pari-mutuel activity. See Florida Quarter Horse Racing Ass'n., Inc. v. DBPR, Case No. 11-5796 (DOAH May 6, 2013). The First District Court of Appeal affirmed the Administrative Law Judge's conclusion that pari-mutuel permitholders are not free to define for themselves the nature and scope of the pari-mutuel activities. See Florida Quarter Horse Track Ass'n, Inc. v. Dep't of Business and Prof'l Reg., 133 So. 3d 1118 (Fla. 1st DCA 2014) More importantly, both the court and the ALJ recognized that the Division's issuance of licenses that allow for

significant changes in the historical activities authorized under a pari-mutuel permit can be construed as falling under the rulemaking requirements of Section 120.54, Florida Statutes.

III. Agency Statements that Constitute Unadopted Rules

As the Division is aware, horsemen are vital to the continuance of the pari-mutuel horse racing industry in Florida. Horsemen have a large capital investment in their horses and depend on the purse monies to fund their continued racing activities. Without the horsemen, there can be no horse racing. In acknowledgement of the importance of the horsemen to Florida's pari-mutuel industry, the Legislature includes provisions in Chapters 551 and Section 849.086 requiring the cardroom and slot machines operations to be affiliated with pari-mutuel facilities that run live racing or games, as well as, require agreements between the horsemen associations and the various permitholders governing the disbursement of purses and awards to the horsemen. Specifically, with respect to quarter horses, amendments to those statutes were passed to require, among other things, purse agreements with FQHRA or the horsemen's association representing the majority of the horsemen. See §§20, 24, Ch. 2009-170, Laws of Florida (2009).

With respect to cardrooms, Section 849.086(2)(f) specifically defines a "cardroom operator," in part, as "a licensed pari-mutuel permitholder which holds a valid permit and license issued by the division pursuant to chapter 550." A cardroom license may only be issued to a licensed pari-mutuel permitholder and the licensee must have conducted a certain number of live performances as part of the pari-mutuel annual license. See §849.086(5)(a) and (b), Fla. Stat. In addition, Section 849.086(13)(d)3., provides that:

> No cardroom license or renewal thereof shall be issued to an applicant holding a permit under chapter 550 to conduct pari-mutuel wagering meets of quarter horse racing unless the applicant has on file with the division a binding written agreement between the applicant and the Florida Quarter Horse Racing Association or the association representing the majority of the horse owners and trainers at the applicant's eligible facility, governing the payment of purses on live quarter horse races conducted at the licensee's pari-mutuel facility. The agreement covering purses may direct the payment of such pursues from revenues generated by any wagering or gaming the applicant is authorized to conduct under Florida law. All purses shall be subject to the terms of chapter 550. [Emphasis added.]

Similar provisions are included in Chapter 551 applicable to slot machine licensure. As a condition of slot machine licensures, as well as to maintain continued authority to conduct slot machine gaming, pursuant to Section 551.104(4), a slot machine licensee shall, among other things:

> (b) Continue to be in compliance with chapter 550, where applicable, and maintain the pari-mutuel permit and license in good standing pursuant to the provisions of chapter 550. . . .
>
> (c) Conduct no fewer than a full schedule of live racing or games as defined in s. 550.002(11). . . .

In addition, with respect to the distribution of purses, Section 551.104(10)(a)2., provides:

> No slot machine license or renewal thereof shall be issued to an applicant holding a permit under chapter 550 to conduct pari-mutuel wagering meets of quarter horse racing unless the applicant has on file with the division a binding written agreement between the applicant and the Florida Quarter Horse Racing Association or the association representing a majority of the horse owners and trainers at the applicant's eligible facility, governing the payment of purses on live quarter horse races conducted at the licensee's pari-mutuel facility. The agreement governing purses may direct the payment of such purses from revenues generated by any wagering or gaming the applicant is authorized to conduct under Florida law. All purses shall be subject to the terms of chapter 550. [Emphasis added.]

These provisions evidence the clear legislative intent that gaming activities are required to be conducted in conjunction with pari-mutuel permitholder's live racing activities and that the horsemen are intended to share in the revenues generated by wagering or gaming. Since the Legislature specifically denoted the FQHRA or an association representing the majority, the legislative intent is for the horsemen's group to be an independent whether it is the FQHRA or an independent group located only at one facility.

This long-standing industry interpretation of the role of an independent horsemen's group is confirmed by the established interpretations and implementation of the Interstate Horseracing Act ("IHA"). The IHA regulates off-track wagering on horse races. Before a racetrack can simulcast its live races to out-of-state locations so that its races can be wagered on by out-of-state bettors, it must have an agreement with a "horsemen's group." See 15 U.S.C. § 3004(a). Under the IHA, a "horsemen's group" is defined similar to Florida law as "the group which represents the majority of the owners and trainers racing [at a given racetrack] for the races subject to the interstate off-track wager on any racing day." See 15 U.S.C. § 3002(12). Given the lucrative nature of out-of-state simulcast wagering for the racetracks, the racetracks' agreements with horsemen's groups are essential to the success of the racetrack, the horsemen and their employees, and, indeed, the industry. Under the IHA, the horsemen's group pari-mutuel permitholder cannot create or require a captive horsemen's group. For the past seven race meets at Hialeah, the FQHRA has served as the "horsemen's group" for purposes of the IHA. The division's approval of a captive horsemen's group for Hialeah puts Florida at odds with the IHA interpretation of a horsemen's group.

The Division's agency statements at issue here are in total disregard of the intent and traditional interpretation of the applicable statutes to protect the interests of the horsemen and that the horsemen's associations operate as independent groups to ensure the horsemen receive a fair share of the revenues resulting from the various pari-mutuel wagering and/or gaming activities. The terms "majority" and "horsemen's association" are not specifically defined in Chapter 550, 551 or Section 849.086. The Division should interpret and apply these terms as traditionally understood in the industry. The Division has rule making authority as set forth in Sections 550.0251(13) and 550.3551(10). Apparently, the Division has not promulgated rules defining those terms and the parameters for establishing a horsemen's association as the recognized horsemen's group for a particular facility as the need has not arisen. Now, however, the pari-mutuel permitholders are seeking to alter the role of the horsemen's group in order to dictate how racing can be conducted and to retain more of the revenues generated from new gaming opportunities which can only be conducted in conjunction with legitimate racing. The Division's acceptance, on a prospective basis, of an agreement with a captive horsemen's association, such as SFQHA, as meeting the requirements of the applicable statutes, is a significant shift in the interpretation and implementation of the applicable statutes. There is no statutory basis for the Division's actions allowing the individual tracks to define what constitutes the requisite horsemen's association on an *ad hoc* basis from track to track. To allow this significant policy change to proceed without the benefit of input from the public and pertinent stakeholders, is unconscionable and in contravention of the requirements of Section 120.54.

The Division's interpretation will likely have far reaching implications with the respect to the continued viability of the quarter horse racing industry as a whole and the ability of the horsemen to continue racing. The Division is well aware that the Legislature has considered, but not approved, the decoupling of new forms of gaming from established pari-mutuel vehicles. So far, the Legislature has chosen not to disturb that delicate balance. The Division's actions effectively amount to a *de facto* decoupling contrary to the intent of the governing statutes. It is up to the Legislature to decide what, if any, action to take on decoupling. In the meantime, the Division is constrained to apply the current statutes in a uniform fashion cognizant of the overriding legislative intent to protect the interests of the horsemen by requiring the tracks to cooperate with the horsemen in determining the number of live performances to run and the disbursement of purses.

In sum, the Division has established and implemented new policies to allow a captive horsemen's association that has never represented the majority of the horsemen in a previous race meet at a track and without any evidence the group represents the majority of the horsemen at that track, to comply with the statutory mandates for annual licensure pursuant to Sections 550.002(11), 849.086(13) and 551.104(10) in violation of Section 120.54.

Please be advised that the FHQRA intends to file a challenge to the unadopted rules described above pursuant to Section 120.56(4), unless the Division ceases reliance on the unadopted rules and proceeds to rule making. This letter serves as notice that if the filing of a

Petition pursuant to Section 120.56(4) challenging the unadopted rules becomes necessary FQHRA intends to seek the recovery of its attorneys' fees and costs pursuant to Section 120.595(4).

We respectfully request your prompt attention and action on this very important matter.

Sincerely,

J. Stephen Menton
Tana D. Storey

JSM/tds