



REVIEW OF MASSACHUSETTS STATE RACING COMMISSION AND INDUSTRY

Prepared for: Massachusetts Gaming Commission
July 16, 2012

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Contents

EXECUTIVE SUMMARY	3
INTRODUCTION	4
INDUSTRY TRENDS	5
PLAINRIDGE RACECOURSE.....	7
SUFFOLK DOWNS.....	7
RAYNHAM-TAUNTON PARK	7
WONDERLAND	8
STATE RACING COMMISSION	9
OVERVIEW	9
TRENDS	9
WORKFORCE	11
FINANCIAL OVERSIGHT.....	11
EMPLOYEE CLIMATE AND VIEWPOINTS	12
LEGAL ISSUES.....	13
INDUSTRY TRENDS	14
RACING ASSOCIATIONS (TRACKS).....	14
HORSEMEN’S GROUPS.....	16
<i>Harness Horseman’s Association of New England</i>	16
<i>New England HBPA</i>	16
MASSACHUSETTS RACING: MEDIA PERCEPTION	18
MASSACHUSETTS RACING COMMISSION: MOVING FORWARD	22
REGULATORY REFORM	23
RACING OFFICIALS ACCREDITATION STATUS	23
EQUINE MEDICATION AND TESTING.....	24
INDIVIDUAL LICENSING AND ENFORCEMENT	24
RANDOM DRUG TESTING (HUMAN)	25
REVENUE AND TOTE AUDIT.....	25
BUSINESS PROCESSES AND TECHNOLOGY	26
HUMAN RESOURCES/OPERATIONAL NOTES	26
SUGGESTED NEXT STEPS	27
APPENDIX	28

Figures

Figure 1: Massachusetts live handle by track, 2007-11.....	5
Figure 2: Massachusetts on-track (import) simulcasting handle by track, 2007-11.....	6
Figure 3: Massachusetts off-track simulcasting handle by track, 2007-11.....	6
Figure 4: Massachusetts purses paid by track, 2007-11.....	6
Figure 5: State Racing Commission workload, 2007-11.....	10
Figure 6: State Racing Commission workload (continued), 2007-11.....	10
Figure 7: Massachusetts Thoroughbred foals, mares bred and stallions registered, 2006-11.....	20
Figure 8: Massachusetts Standardbred foals, mares bred and stallions registered, 2006-11.....	20

Executive Summary

The Massachusetts racing industry is in decline. In the five-year period from 2007-11, the purses and wagering declined substantially at the state's two horse racetracks, Plainridge and Suffolk Downs. The state's two greyhound tracks, Raynham-Taunton and Wonderland, ceased live racing on January 1, 2010, as a result of a statewide referendum prohibiting dog racing. The State Racing Commission likewise has experienced declines in its workload, ranging from applications processed to testing samples collected.

We found in interviews that the SRC staff are experienced, dedicated and proud of their work. However, we note significant opportunities exist to modernize Massachusetts racing regulation and increase agency efficiency. SRC staff also expressed concern about a lack of hands-on leadership and a disconnect in certain areas between their supervising agency (the Division of Professional Licensure) and SRC daily operations. They expressed a fear of the unknown regarding their futures, due both to the state of the Massachusetts racing industry and to the transfer of the SRC to the Massachusetts Gaming Commission.

From the live racing perspective, both Plainridge and Suffolk Downs are focusing on their gaming applications; if successful, they believe gaming revenues will substantially improve their racing product. The two horsemen's groups – the Harness Horsemen's Association of New England and the New England Horseman's Benevolent & Protective Association – have solid working relationships with Plainridge and Suffolk Downs, respectively.

The media generally portray the Massachusetts racing industry as having a weak status and outlook, citing key performance statistics noted above. A 2010 *Boston Globe* story described Suffolk Downs as being on life support. Another state newspaper in 2011 noted that it is not economically feasible for many horses to race at Plainridge due to the low purses.

As a result of our research and analysis, Last Frontier Consulting and Spectrum Gaming Group recommend the following courses of action as the MGC prepares to absorb the SRC:

- Adopt the Association of Racing Commissioners International Model Rules of Racing.
- Outsource testing to an accredited laboratory.
- Upgrade the audit/financial system.
- Update the licensing system and utilize technology to enhance/streamline information management.
- Invest in Human Resources to enhance the professional profile of the SRC/MGC-Racing Division.
- Arrange for an independent audit of the SRC/MGC-Racing Division.

Introduction

Last Frontier Consulting (“LFC”) and Spectrum Gaming Group (“Spectrum”) jointly responded to the April 18, 2012, Massachusetts Gaming Commission RFR # MGC-2012-001 for “Ad-hoc Audit / Consulting Review Services.” The Massachusetts Gaming Commission (“MGC”) was seeking a holistic overview of the Massachusetts racing industry to prepare for the transfer of duties and responsibilities held by the State Racing Commission (“SRC”). The MGC will thus regulate the Commonwealth’s racing industry through a newly created Racing Division (“MGC-Racing Division”).

LFC and Spectrum created a multi-faceted work plan including data analysis of public records, literature/article review, and interviews with key stakeholders and industry experts. This work plan allowed LFC and Spectrum to provide the MGC with the requested overview as well as develop strategic insights for consideration by the MGC as it seeks to bring best practices to Massachusetts racing regulation.

About the Consultants

Last Frontier Consulting provides management consulting, due diligence and interim senior management to organizations with a specific client concentration in the gaming industry. Projects include the privatization of Meadowlands Racetrack and related assets from the New Jersey Sports & Exposition Authority.

Spectrum Gaming Group is an independent research and professional services firm that provides market analyses, feasibility studies, gaming-regulation consulting and due diligence services to public- and private-sector clients worldwide. Separate from this engagement, the Massachusetts Gaming Commission has engaged Spectrum – working together with the Michael & Carroll law firm – to provide regulatory services. The Massachusetts State Lottery Commission has also engaged Spectrum to provide advisory services concerning online gaming.

Industry Trends

The pari-mutuel landscape in Massachusetts changed forever when voters approved a referendum in November 2008 that banned dog racing effective January 1, 2010. We analyzed data from SRC annual reports to determine just how dramatic the changes were by comparing data during the last year of dog racing (2009) with data in 2010, the first year that the dog-racing ban took effect. We also examined overall five-year trends, which clearly show that even before the dog-racing ban, handle at the pari-mutuels had already started to decline significantly. The forced closing of dog tracks at Raynham and Wonderland accelerated that downward trend.

Data from 2010 (the first year of the dog racing ban) compared with 2009 (when the dog tracks operated) show the following overall results:

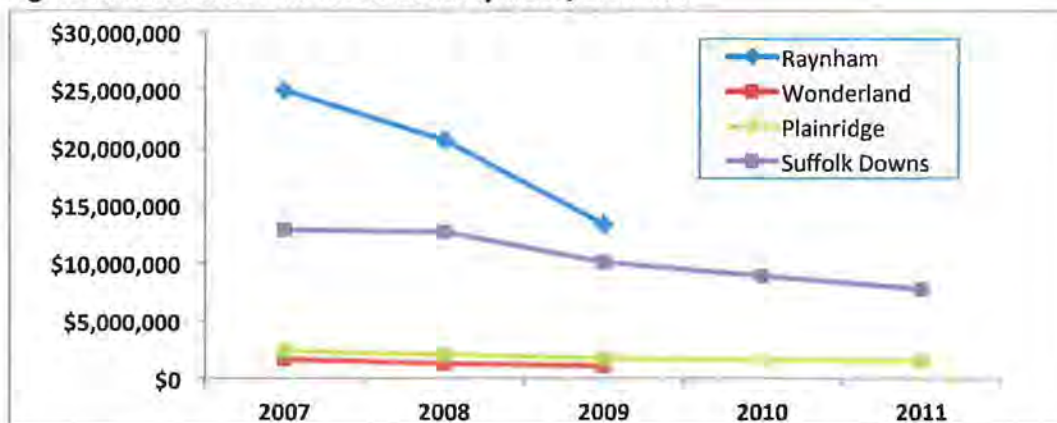
- Live performances fell from 702 to 201, a decline of 71 percent.
- Live handle fell from \$26.2 million to \$10.5 million, a decline of 59.9 percent. (It fell to \$9.2 million in 2011, a decline of another 12 percent.)
- Total handle fell from \$390.1 million to \$348.3 million, a decline of 11 percent. (It fell to \$291.4 million in 2011, a decline of another 16 percent¹.)

Looking at the five-year period ending in 2011, we note the following:

- Live handle fell 78 percent.
- Total handle fell 34 percent.

The following illustrate the statistical trends in chart format:

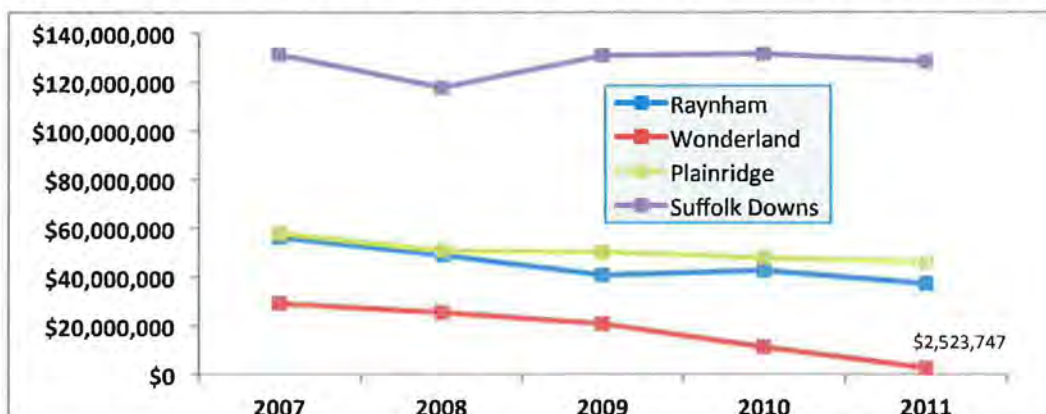
Figure 1: Massachusetts live handle by track, 2007-11



Source: Massachusetts State Racing Commission. Live handle is money bet on a track's live racing at the location the racing is taking place

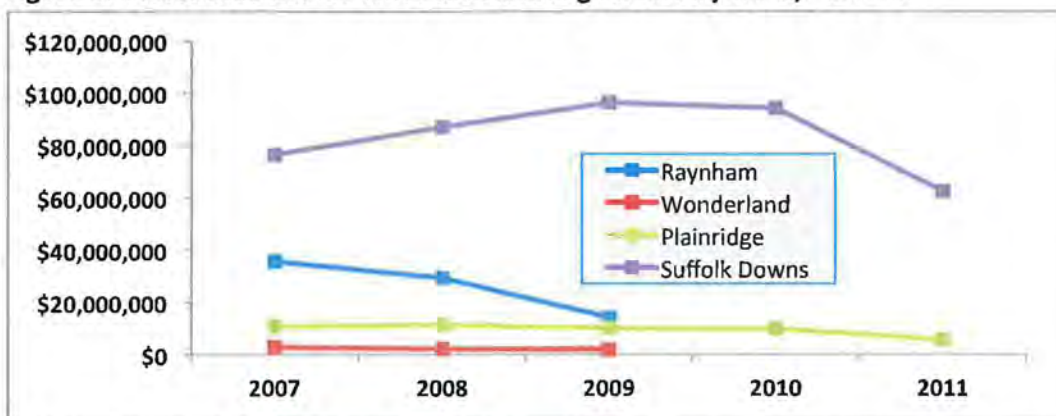
¹ 2011 statistics from draft 2011 MRC annual report; all others from published annual reports

Figure 2: Massachusetts on-track (import) simulcasting handle by track, 2007-11



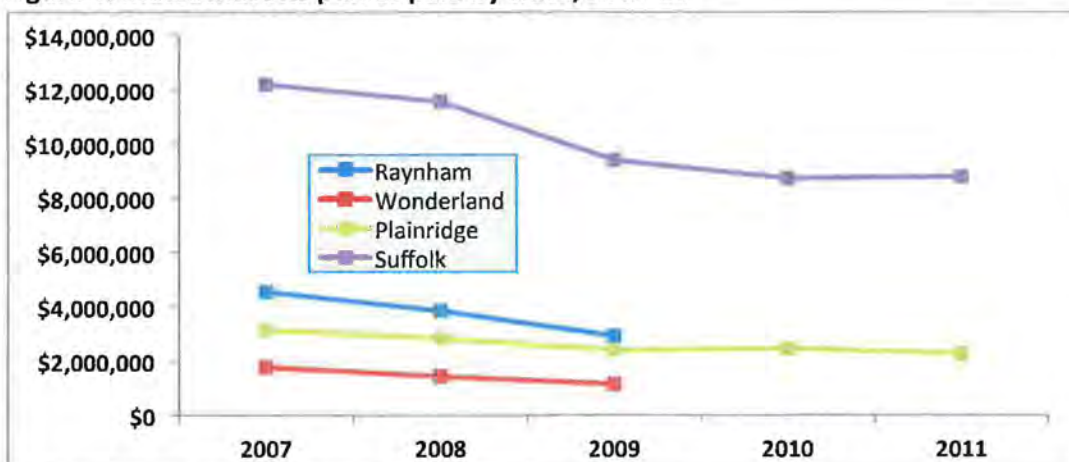
Source: Massachusetts State Racing Commission. Note that the 2011 Wonderland simulcast session was held at Suffolk Downs, as the Wonderland license was transferred to Suffolk Downs. *Import simulcast example: money bet at Suffolk on racing held at Belmont Park*

Figure 3: Massachusetts off-track simulcasting handle by track, 2007-11



Source: Massachusetts State Racing Commission. *Off-track handle is money bet on (for example) Suffolk races by patrons at other tracks*

Figure 4: Massachusetts purses paid by track, 2007-11



Source: Massachusetts State Racing Commission

Plainridge Racecourse

Plainridge, the only Standardbred track in Massachusetts, opened on March 17, 1999. It offers live harness three days a week from April to December. The track has a pending request to reduce the number of live racing days for 2012 from 100 per year to 80.

We tracked the following performance indicators for the 2007-11 period:

- Live handle fell from \$2.4 million in 2007 to \$1.5 million in 2011, a decline of 39 percent.
- On-track simulcast wagering fell from \$57.9 million to \$46.1 million, a decline of 20 percent.
- Off-track simulcast wagering fell from \$10.9 million to \$5.8 million, a decline of 47 percent. (Much of it, 41 percent, occurred from 2010 to 2011.)
- Purses paid fell from \$3.1 million to \$2.5 million, a decline of 21 percent (this comparison is for 2007-10).

Suffolk Downs

Suffolk Downs, the only Thoroughbred track in Massachusetts, opened in 1935. Its 2012 live calendar consists of 80 live racing days from June to October (pending approval from the Legislature for a reduction in dates). The track is dark on Thursdays, Fridays and Sundays. It offers year-round simulcasting.

We tracked the following performance indicators for the 2007-11 period:

- Live handle fell from \$12.9 million to \$7.7 million, a decline of 40 percent.
- On-track simulcast wagering fell from \$131.3 million to \$128.3 million, a decline of 2 percent.
- Off-track simulcast wagering fell from \$76.4 million to \$62.4 million, a decline of 18 percent. (From 2010 to 2011, it sustained a decline of 34 percent. We note that during the preceding years, off-track simulcast handle has actually increased by more than 25 percent.)
- Purses paid fell from \$12.2 million to \$8.8 million, a decline of 28 percent.

Raynham-Taunton Park

The Raynham-Taunton Park dog track opened in 1940. Voters statewide approved a referendum that forced the operator to no longer offer live racing as of January 1, 2010, but the

facility was permitted to continue to offer on-track simulcasting, which allows patrons to wager on races run at other tracks throughout the country. The park is open year-round for simulcasting.

On-track simulcasting handle fell from \$56.3 million in 2007 to \$37.2 million in 2011, a decline of 34 percent.

We note that live handle had already begun to fall even before the ban took effect, especially in 2009, which was the last year of dog racing in the state. Live handle fell from \$24.9 million in 2007 to \$13.3 million in 2009, a decline of 47 percent – the decline for the one-year period from 2008 to 2009 alone was 35 percent.

Off-track simulcasting handle and purses paid fell 60 percent and 36 percent, respectively, during the last three years (2007-09) that the track offered live racing.

Wonderland

The Wonderland dog track opened in 1935 in Revere. It ran its last live race on September 18, 2009. After passage of the referendum that banned dog racing, the facility was permitted to continue offering on-track simulcasting, which allows patrons to wager on races run at other tracks.

The park closed its doors for good on August 18, 2010, but secured permission to have its simulcast license – where patrons wager on races at other greyhound tracks – transferred to Suffolk Downs, which began using Wonderland's simulcast license on June 2, 2011.

Before the end of live greyhound racing, Wonderland offered 100 days of live racing from April-September 2009; it ceased live racing on September 18, 2009.

We note that live handle had already begun to fall even before the ban took effect. Live handle fell from \$1.6 million in 2007 to \$1.1 million in 2009, a decline of 29.5 percent. And the decline for the one-year period from 2008 to 2009 was 18.8 percent.

On-track simulcasting handle fell from \$29.3 million in 2007 to \$20.7 million in 2009, a decline of 33 percent. Purses paid during the same time period fell 36 percent. Off-track simulcasting handle fell from \$2.9 million in 2007 to just \$1.9 million in 2009.

As noted earlier, Wonderland closed in 2010 but worked out an arrangement with Suffolk Downs to have its simulcast license transferred to that facility. The SRC annual report indicates an on-track simulcast handle for the Wonderland at Suffolk Downs session of \$2.5 million in 2011.

State Racing Commission

Overview

The mission of the State Racing Commission is to ensure the integrity of racing in the Commonwealth of Massachusetts. The SRC provides enforcement of rules and regulations and monitors pari-mutuel wagering and the resultant revenues. The Division of Professional Licensure (“DPL”) has provided oversight of the SRC since January 1, 2010. Prior to that transfer, the SRC was a separate, “standalone” agency within the Office of Consumer Affairs (“OCA”). Per Section 89 of Chapter 194 of the Acts of 2011, regulatory responsibilities transferred to the Massachusetts Gaming Commission (MGC). MGC entered into a service agreement with DPL to continue providing staff and support services through December 31, 2012.

Trends

Data from 2010 (the first year of the dog-racing ban) compared with 2009 (when the dog tracks operated) show the following overall trends:²

- Applications processed by the SRC fell from 3,686 in 2009 to 3,298 in 2010, a decline of 10.5 percent.
- Urine samples collected and analyzed fell from 5,166 in 2009 to 2,797 in 2010, a decline of 45.8 percent.
- Total SRC expenditures fell from \$1.7 million in 2009 to \$1.4 million in 2010, a decline of 17.6 percent. Total SRC revenue fell from \$5.1 million in 2009 to \$4 million in 2010, a decline of 21.6 percent.

Looking at the overall five-year period ending in 2011, we note the following:

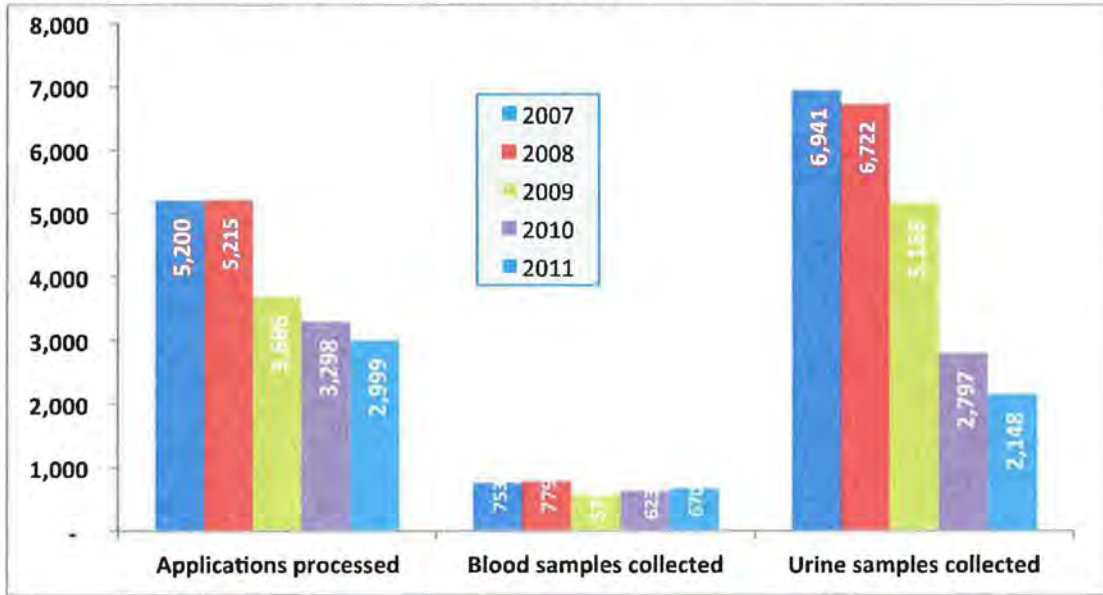
- Applications processed fell 42 percent.
- Urine samples collected and analyzed fell 69 percent.
- Total SRC revenue fell from \$6.3 million to \$3.7 million, a decline of 41.2 percent.
- Total SRC expenditures fell from \$2 million to \$1.4 million, a decline of 30 percent. Employee compensation accounted for 94 percent of expenditures in 2007. In 2011, it accounted for 65 percent of expenditures. The SRC relied more heavily upon outside contractors in 2011 than it did in 2007, and did not have full-time employees in roles

² Massachusetts Racing Commission Annual Reports, 2007-2010, draft report 2011

such as Director of Laboratory, CFO, and Director of Racing; which previously were filled. This resulted in employee compensation accounting for a lower percentage of overall expenditures.

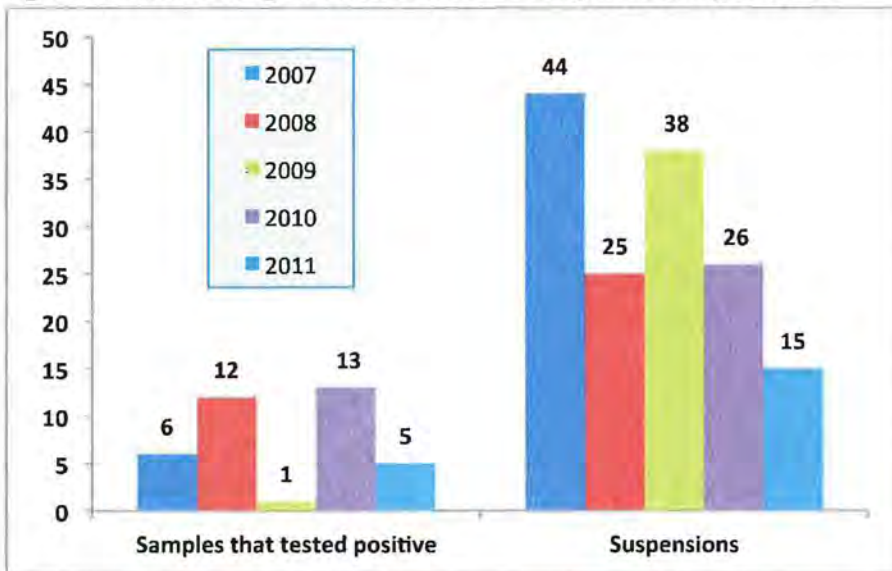
The following illustrate the statistical trends in chart format:

Figure 5: State Racing Commission workload, 2007-11



Source: Massachusetts State Racing Commission. Note that blood samples were not collected for dog racing.

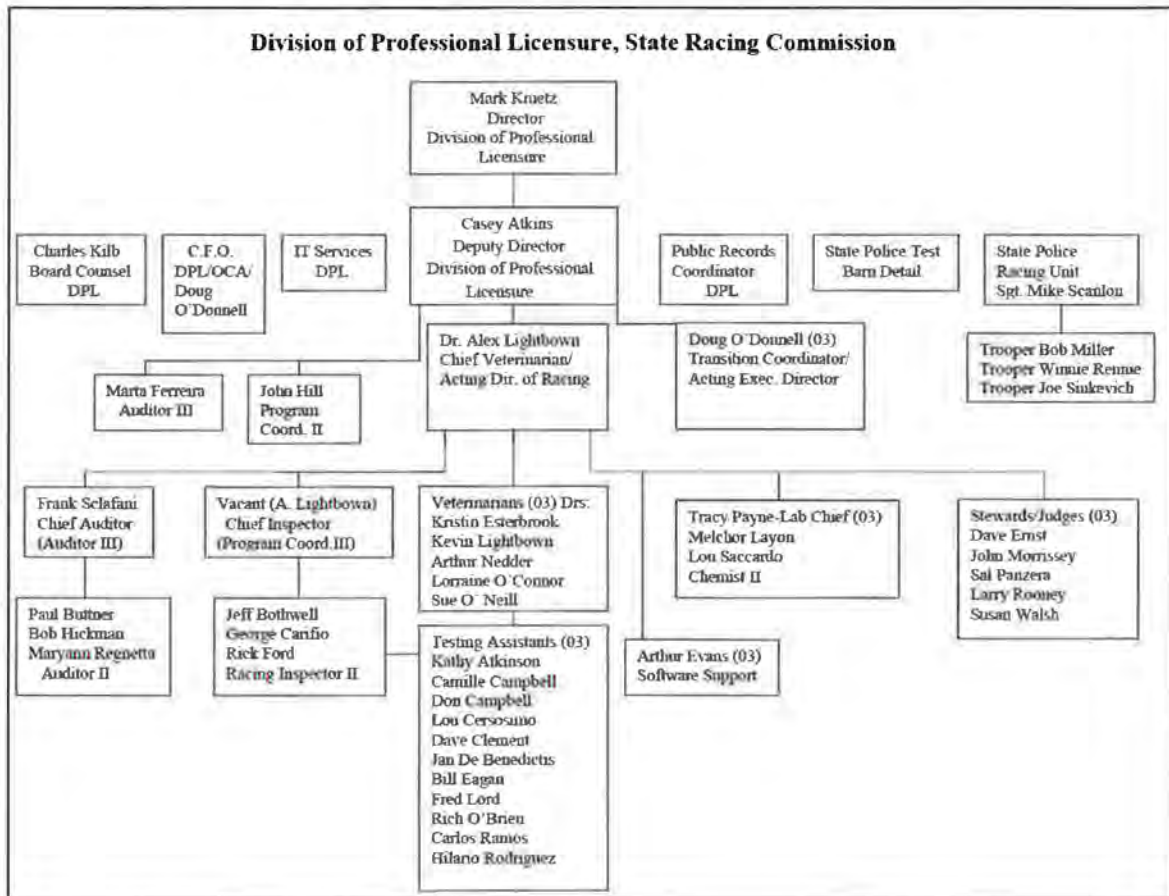
Figure 6: State Racing Commission workload (continued), 2007-11



Source: Massachusetts State Racing Commission. Note that suspensions can occur for any number of infractions, including positive tests.

Workforce

As noted above, over the past several years the SRC staff has undergone significant reductions and organizational changes. The current organizational structure as provided by SRC staff is as follows (see Exhibit 1 for full-page view):



Source: Massachusetts Division of Professional Licensure

Detailed employee information including name, hire date, compensation, classification, etc., was provided directly to the MGC by the DPL. Supporting departments currently include DPL and/or OCA human resources, systems, legal and finance.

Financial Oversight

Office of Consumer Affairs Chief Financial Officer Gray Holmes and Deputy Budget Director Maggie Makoro provide financial oversight to the SRC. The prior organizational structure included a dedicated SRC Chief Financial Officer (Rich Mudarri, retired April 2011). There are no reported issues with current operations. It should be noted that the SRC has not had the benefit of an independent audit for several years.

Employee Climate and Viewpoints

We conducted in-person introductions, meetings and field observations on May 23-24 and June 4-6 with several SRC staff and contract workers³ as well as former Commissioners. Overall, the SRC is represented by a dedicated group of workers with significant time of employment in the commission. They collectively take a great deal of pride in their work, despite having seen a continued reduction in staff and resources over the past several years consistent with the decline in Massachusetts racing. Morale has been negatively impacted by two key factors:

- Uncertainty about their future
- Limited resources, including equipment, supplies and manpower

Many staff noted the absence of dedicated leadership in the areas of finance, laboratory/testing, and regulatory knowledge due to retirements of key individuals. The remaining full-time staff has been stretched to cover responsibilities for which they may not have had sufficient training or professional knowledge. The situation has caused a fair amount of stress among individuals, with representative comments during interviews including:

- “I’m doing what I think I should, but I am not a CPA and I don’t have one to go to directly for help,” and
- “I used to have a full-time director I could turn to, now I have to wait for a day when [name of person] is available to work with us.”

There also seems to be a dilution of purpose which has impacted the clarity of work streams. For example, individuals were observed being task-focused without a clear sense of why they were performing the work. Representative comments included:

- “[Name of person] set up this spreadsheet years ago, I just fill it in. I’m not sure why we do it this way.”

Virtually every staff member with whom we spoke expressed fear of the unknown. Due to the uncertain state of the Massachusetts racing industry, the fate of the staff has been unclear for at least two years. One senior staffer described employee morale as “... stayed fairly positive despite all the uncertainty. People just want to know what jobs there will be and who will be in charge.” People are looking for clarity about their leadership, their jobs and their future.

Additionally, there may have been some cultural differences between previous SRC operations and DPL procedures. For example, whereas the DPL operates on a more standard Monday-Friday schedule, legacy SRC employees are accustomed to supporting the hours associated with live racing and import simulcasting, i.e., evenings, weekends and other peak

³ See Exhibit 4 for listing.

times for racing. Employees expressed to us that they, and thus the SRC, operated previously as a largely autonomous unit rather than requiring the approvals from a supervisory agency that did not have a hands-on dedicated role in SRC functions.

Karen Malone, OCA Human Resources Director, indicated that there are no HR legacy issues beyond one contested termination from 2010 which will proceed to arbitration. Labor relations with corresponding unions are reported as favorable. According to OCA HR, employees are on the performance review cycle corresponding to their state pay grade.

We solicited perspectives regarding SRC staff and contract employees from racetrack associations and horsemen groups. The feedback on personnel was overwhelmingly positive, with unsolicited praise from all constituents for Dr. Alex Lightbown, Chief Veterinarian/Acting Director of Racing, and Doug O'Donnell, Transition Coordinator/Acting Executive Director. Specifically, Dr. Lightbown was acknowledged across the board for her collaborative work style and commitment to Massachusetts racing. Suffolk Downs, Plainridge Racecourse and Raynham management noted the enhanced coordination and responsiveness that Mr. O'Donnell has brought to the process. However, echoing staff comments, both tracks and horsemen groups believe that many of the retirements over the past few years have left knowledge gaps at the SRC. The opportunity for improvement on "speed to market" for administrative decisions was also noted, in particular for regulatory reform issues. For example, Suffolk Downs has pending regulatory change requests from Q1 2011 for a change in tote calculations (rounding to nickel versus dime) and Q3 2011 for a change in medication guidelines (phenylbutazone) that have not been brought to conclusion due to the impending transfer of authority to MGC.

Legal Issues

Charles Kilb, DPL Board Counsel, provides legal counsel to the SRC. Mr. Kilb has met directly with MGC to brief it on any outstanding or legacy legal issues. The MGC is presently gathering information with regard to an issue raised by greyhound owners with respect to the proper allocation of monies from the Racing Stabilization Fund as well as monies paid into this account.

From a resource-planning perspective, Mr. Kilb estimates an allocation of five to eight hours per week on MGC-Racing Division business, with occasional "flare-ups" demanding more focus. Kilb also attends monthly SRC meetings and drafts all decisions. Mr. Kilb (along with other stakeholders discussed further in this report) notes there is a clear opportunity to review and modernize the racing regulations.

Industry Trends

Racing Associations (Tracks)

We interviewed Gary Piontkowski, President, and Steve O' Toole, General Manager, at Plainridge Racecourse; Chip Tuttle, COO at Suffolk Downs, and George Carney representing Raynham-Taunton. Our areas of inquiry included horsemen's contracts and overall relationships, financial health and ownership, regulatory issues, feedback on prior SRC and staff, and public perception issues. Highlights include:

- **Financial Health:** As part of annual licensing process, racing associations must file ownership and financial statements. Such documents are available to the MGC for review. All tracks stated that they are actively pursuing gaming (Plainridge is focused on the slots-only license, Suffolk Downs is venturing with Caesars Entertainment for a casino resort, and Raynham-Taunton has not yet publicly announced detailed plans). If unsuccessful in their quest for expanded gaming, both tracks currently offering live racing do not envision continued racing at their physical plants (at least not with current ownership). (Note: One would reasonably assume that given the successful development of casinos and a slots-only facility in the Commonwealth and the subsequent legislated funding of a purse account, that live racing in some form would continue somewhere in Massachusetts to facilitate distribution of purse money.)
- **Horsemen's Group:** Both Suffolk and Plainridge have current contracts with their horsemen's groups. Plainridge enjoys a solid working relationship with Harness Horseman's Association of New England, with a contract extended to December 31, 2012. Suffolk Downs and the New England Horseman's Benevolent & Protective Association ("NEHBPA") have had a rockier relationship. (In 2011 contract negotiations broke down and, at one point, the Thoroughbred signals were pulled for approximately three weeks.) However, both horsemen and management report that the current working relationship is on steadier ground. The current NEHBPA/Suffolk Downs recognition agreement expires May 31, 2013, with the purse agreement valid through December 31, 2012.
- **Purse Account:** Plainridge management does not believe there are issues with their purse account. They estimated they have overpaid a cumulative \$1 million over the past 15 years but are not seeking to balance this overpayment. Suffolk Downs management noted there were past issues with the revenue split from simulcasting commissions that were addressed in the 2011 and 2012 purse agreements.
- **Public Perception – Horse Welfare Issues:** Suffolk Downs (track management and horsemen) are very supportive of "second career" programs for racehorses, including

active work for the New England branch of CANTER (The Communication Alliance to Network Thoroughbred Ex-Racehorses). Suffolk Downs was one of the first Thoroughbred tracks to take a stand against anyone in its trainer colony selling to or recruiting horses for “kill buyers.”⁴ Plainridge (track management and horsemen) do not believe this was a negative for their track either, citing active work to place former racehorses in new careers.

• **Top Issues for Tracks:**

- Suffolk Downs:
 - The track has EPA issues on backstretch but has completed a \$3.5 million drainage project. Management is expecting a final settlement with EPA in the near future.
 - A need to improve the racing facility and barn area.
 - An inability to offer more competitive purse levels.
 - Management noted that Boston has an underlying strength/propensity to support a racing product. The market participates in racing as evidenced by Saratoga visitation, Breeders Cup television ratings, among various factors. However, consumers are not attracted to the current Suffolk Downs product. Suffolk Downs is working on a potential capital plan to upgrade its track with a new turf course, enhance customer experience with upgraded sound system, display board, and revamp clubhouse and simulcast areas.
 - On the backside, plans are being developed at Suffolk Downs to update selected barns, and move track kitchen and recreation center to accommodate casino plans. Suffolk Downs noted that it does access the state Capital Improvement Funds every year but it is not enough to keep pace with the aging facility.
- Plainridge:
 - Focused on slots-only gaming application.
- Raynham-Taunton:
 - Currently “vetting” prospective partners for a slots-only gaming application.

⁴ The term refers to individuals or organizations who purchase horses for slaughter, although they may purchase for other purposes as well.

- **Regulatory Issues:**

- Suffolk Downs:

- Management is most concerned with issues supporting safety and integrity. They asked the SRC to change current Massachusetts' medication regulations (i.e., administration of NSAIDS on race day) to mirror the Association of Racing Commissioners International ("ARCI") model rule in 2011 (note: see section "SRC: Moving Forward" for more detail on model rules) but this change has not yet been incorporated. Suffolk Downs also has a pending request from mid-2011 regarding calculation of "odd cents" from dime to nickel. Overall, Suffolk Downs management is strongly in favor of any regulatory reform that will bring Massachusetts racing in line with the Model Rules advocated by the ARCI, including requests that State Stewards be accredited.

- Plainridge:

- Requests that State Judges be accredited.
 - Follows USTA rules and guidelines.

Horsemen's Groups

Harness Horseman's Association of New England

The Harness Horseman's Association of New England ("HHNE") has a current contract with Plainridge that expires December 31, 2012. The HHNE expects future contract negotiations to go smoothly. The Association expressed a positive working relationship with Plainridge management. HHNE President Mike Perpall explained that both Plainridge and the HHNE are working with limited funds and racing for small purses. Plainridge goes "above and beyond" to foster good relationships with their horsemen, including providing free coffee in the paddock and hosting social gatherings (pizza days, BBQs). The primary issues for the HHNE focus on financial matters and maintaining the ability for their core horsemen to train year-round (HHNE leases Plainridge during dark months). Mr. Perpall had positive comments on SRC staff including State Troopers assigned to track, but also requested that State Judges become accredited. The HHNE engages lobbyist Martin Corry.

New England HBPA

The New England Horseman's Benevolent & Protective Association ("NEHBPA") describes its relationship with Suffolk Downs as "contentious" in the past but since improving

and, on a day-to-day basis, “positive.” Areas of dispute have included the revenue allocation from simulcasting (“... law is that track and horsemen need to negotiate between 4 percent and 7.5 percent of simulcast handle for purses ... in years prior to 2011, Suffolk was paying about 4.6 percent and after 2011 negotiation, the parties agreed to a 50-50 split of simulcasting proceeds net of simulcasting expenses which increased 2011 annual purse payment to 6.35 percent of simulcast handle.⁵”), number of racing days and access to stabling and racetrack both pre- and post-meet. The NEHBPA has two current agreements with Suffolk Downs: a recognition agreement that expires May 31, 2013, and a purse agreement that expires December 31, 2012. The NEHBPA utilizes lobbyist Brian Hickey & Associates, and the Massachusetts Thoroughbred Breeders lobbyist is Andy Hunt.

From a regulatory perspective, NEHBPA leadership expressed concern that in recent years there has not been a consistent, knowledgeable racing advocate at the SRC level. Specifically, they believe there was not an understanding regarding the impacts SRC decision-making had on the livelihood of horsemen and related economies. Additionally, they expressed frustration with the level of transparency and ability to receive legal and financial documents from the SRC in a timely manner (i.e., purse audits). They specifically requested a 30-day notice along with any supporting documentation for issues in front of the SRC that may impact their members.

On a question of regulatory reform, the group is supportive of any initiative that would enhance the integrity of Massachusetts racing.

⁵ Bruce Patton, NEHBPA

Massachusetts Racing: Media Perception

A review of media reports during the past two years paints a bleak picture of the Massachusetts horse racing industry. Racetrack operators themselves repeatedly acknowledged that it might not be possible for them to continue to stay in business as standalone racetracks. According to the owners, they need to add slot machines to provide additional profits that would fund horseracing operations.

Media reports describe Suffolk Downs as being on life support. It offers “small fields and smaller purses,” a reporter noted, adding that “the signs of life are not good.” The reporter found the Terrace Dining room “virtually empty, with rows of barren tables ready for business.” He commented that it is “more hope than reality.”⁶

Suffolk Downs COO Chip Tuttle said that the track has been waiting “eight or nine years” for gaming rights. Without that happening, the long-term future of Thoroughbred racing “becomes a more difficult question” to answer. He noted that some signs are not good: The number of foals has decreased each year and overall wagering nationally has declined by almost \$2 billion from 2008 to 2010.⁷

Suffolk Downs, New England’s only remaining Thoroughbred track, lost nearly \$35 million from 2007-2010. The hope of a casino operation at the track convinced investors to maintain the facility.⁸ Suffolk cut costs by laying off 65 employees and cutting racing days.⁹ Horseracing at Suffolk remains “thinly popular,” as it draws 10,000 people on a good day compared to 66,000 or more when it opened in 1935.¹⁰

The move to cut costs resulted in Suffolk Downs becoming embroiled in a bitter dispute with horsemen in 2011. At issue were the amount paid to winning horse owners, the number of live racing days and the percentage of revenue shared from simulcasting.¹¹ The dispute was eventually resolved, but not before Suffolk Downs’s financial woes were thoroughly aired in public. Racing days were cut from 100 to 80, a move that Suffolk Downs’ executives claim has helped stem the losses by cutting operating costs.¹² Reducing racing days is an option that has been used in other states, such as New Jersey, to cut costs.

⁶ Mark Blandschun, “Betting on a better future,” *Boston Globe*, June 26, 2010

⁷ Ibid

⁸ Casey Ross, “Facing tough times at the track,” *Boston Globe*, August 11, 2010

⁹ Ibid

¹⁰ Ibid

¹¹ Hillary Chabot, “Race against time?” *Boston Herald*, February 8, 2011

¹² Mark Blandschun, “Suffolk appears to be on right track,” *Boston Globe*, October 19, 2011

For example, non-racino tracks across the country, such as Maryland, have reduced racing days to save operating costs.¹³ Maryland cut harness racing dates 49 percent and Thoroughbred dates 21 percent from 2004 to 2008 in an effort to reduce operating expense.

Operators of Massachusetts' lone Standardbred track, Plainridge Racecourse, were even blunter about the need for casino revenue to boost operations. It is needed to save the track from "extinction,"¹⁴ according to Gary Piontkowski, president of Plainridge Racecourse.

To counter the perception that gambling on horses is a bad bet and does not make sense, Plainridge lowered its takeout from 19 percent to 15 percent so that more money goes to the bettor. The takeout on exotic bets was also lowered from 26 percent to 15 percent. Plainridge, like Suffolk Downs, was allowed to reduce its number of racing days from 100 to 80 effective 2012.

The perception at Plainridge is that purses make it "uneconomic" to race there. Purses are as low as \$2,000 for a race. An owner from the New England area told a reporter: "You can't invest \$30,000 to run for \$2,000."¹⁵

Another issue that surfaced during our media review of Massachusetts' horse racing was the state of horse farms. During the legislative debate over casino gaming, arguments were made that revenue needed to be set aside for horse farms that raise horses for the racing industry as the state is losing jobs due to the lack of incentives to for breeding.¹⁶

A review of Jockey Club data shows that Massachusetts has not been a major national factor in producing Thoroughbred race horses. From 2006 to 2011, mares bred averaged 41 a year and stallions standing averaged 11. In 2011, seven Massachusetts stallions were registered with The Jockey Club and only 37 mares were bred.

A review of US Trotting Association data also shows that the state has not been producing many Standardbred foals, either. For the three-year period ending 2011, only six foals were registered; none in 2010. The state had a relatively good year in 2008, when 19 foals were registered. There are also few registered Standardbred stallions in Massachusetts; from eight registered in 2000, the count has dropped to one in 2011. By comparison, in 2010, Pennsylvania had 37 registered stallions; Indiana, 32 and New York, 22. All three racino states use funds generated from the casino industry to provide incentives for breeding in their states.

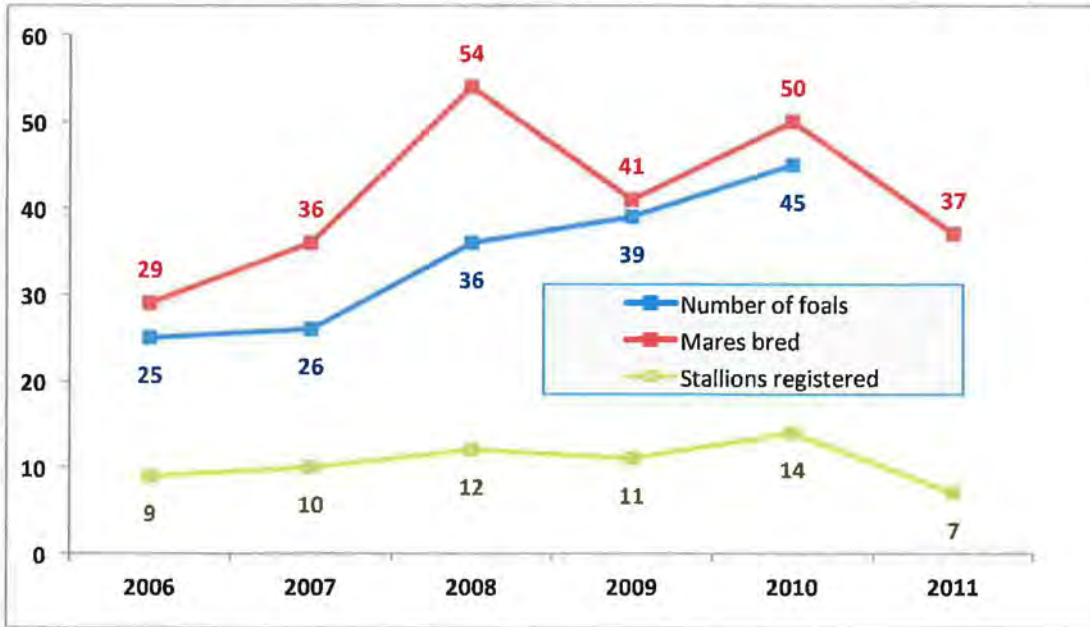
¹³ Interview with Maryland Racing Commission, August 27, 2009

¹⁴ Casey Ross, "Plainridge sees gaming as salvation," *Boston Globe*, August 11, 2010

¹⁵ Rick Foster, "Speaker tours horse farms," *The Sun Chronicle*, May 20, 2011

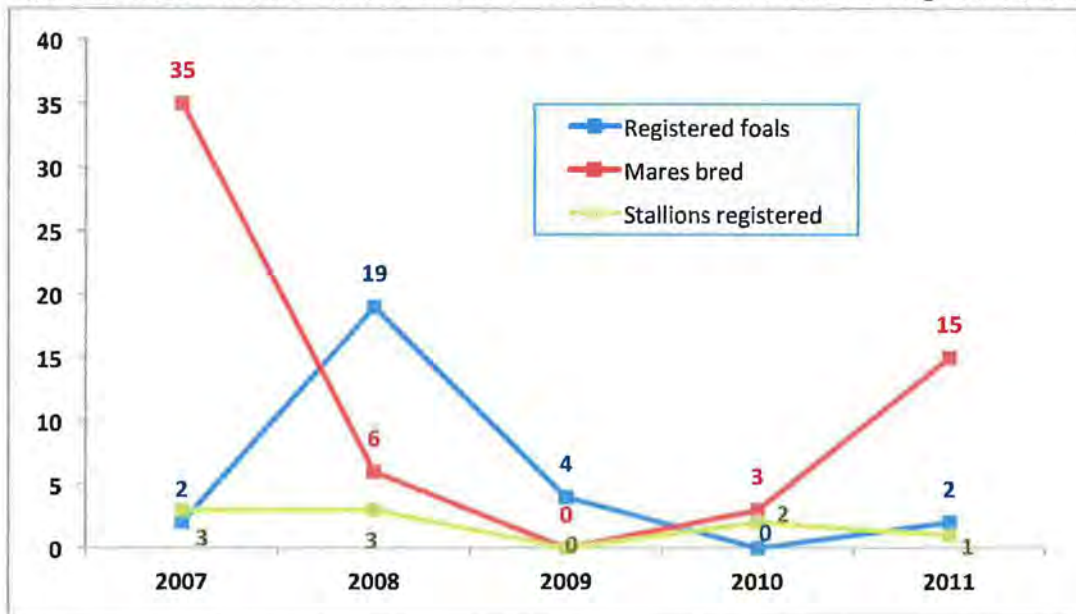
¹⁶ Ibid

Figure 7: Massachusetts Thoroughbred foals, mares bred and stallions registered, 2006-11



Source: The Jockey Club

Figure 8: Massachusetts Standardbred foals, mares bred and stallions registered, 2006-11



Source: US Trotting Association

We acknowledge that the number of registered stallions and foals does not offer a complete picture of the commercial racehorse farm industry in Massachusetts. For example, there clearly were a number of horses associated with racing that were boarded and/or trained at

Massachusetts horse farms that were not captured by The Jockey Club and US Trotting Association data.

The horse racing industry in Massachusetts, as well as throughout the country, struggles to overcome the perception that the sport is too cruel to horses and that the industry does not do enough to protect them. The sentiment was reinforced by a *New York Times* report, "Death and Disarray at America's Racetracks," that found "lax oversight" had put jockeys and horses at risk of serious injury. Published March 24, 2012, the paper reported that, on average, 24 horses die each week at racetracks across America. From 2009 thru March 2012, 6,600 horses broke down or showed signs of injury. According to the *Times* analysis, 53 racehorses in Massachusetts sustained injuries that resulted in their being euthanized. There were 27 states that the newspaper analyzed; eight states had fewer horserace deaths than Massachusetts. The number of deaths in Massachusetts was much lower than the deaths in racino states, where critics claim high purses fueled by casino profits entice trainers to often run unfit horses that are likely to break down.

Track operators argue that the mishaps represent a very small percentage of the horses that run, and that so, too, do the number of horses that test positive for drugs.

Bill Finley, a racing writer whose work has appeared in *USA Today* and other major publications, called out the industry well before the *New York Times* piece in a December 28, 2009, piece written for ESPN.com. Mr. Finley reflected on the last live race run at Raynham Park on December 26, 2009, a dog track that had been operating for 69 years. State voters approved a referendum putting an end to dog racing effective January 1, 2010. He warned that the rejection of dog racing in Massachusetts should provide "a cautionary tale" for horse racing, which he claimed was also not doing nearly enough to protect horses and provide them with dignified retirements after their careers end.¹⁷

By the time the two Massachusetts dog tracks were forced to close, their live handle had already plummeted. The Raynham/Taunton track sustained a live handle decline of 47 percent from 2007 to 2009, and Wonderland's handle fell 33 percent.

Aging fan bases, casino competition and deteriorating facilities hurt dog racing. These same factors adversely impact the state's two remaining racetracks, Plainridge and Suffolk Downs, Mr. Finley claims.

To be sure, there is no visible effort underway to ban horse racing but what happened to dog racing in Massachusetts should serve "as a wakeup call" to the horse racing industry, according to Mr. Finley. "This is still a sport where catastrophic injury rates are far too high, where thousands of Thoroughbreds go to slaughter every year and where the use of legal drugs is condoned," he said.

¹⁷ Bill Finley, "Industry can learn from greyhound ban," ESPN.com, http://sports.espn.go.com/sports/horse/columns/story?columnist=finley_bill&id=4776621, December 28, 2009

Massachusetts Racing Commission: Moving Forward

Over the past several years, funding for the State Racing Commission has followed the downward trend of the racing industry in the Commonwealth. Similarly, there has been attrition in leadership (generally through retirement), including the Executive Director, Director of Finance/CFO, and Laboratory Director. With the racing industry poised to reap the benefits of purses bolstered by casino and slot gaming revenues, opportunities exist to update racing regulations¹⁸ and SRC/MGC-Racing Division business practices. Many of these improvements may require an investment by the Commonwealth and other stakeholders. Massachusetts has an immediate opportunity to re-energize regulatory oversight of racing and pari-mutuel activity, and to prepare for an industry that should be on the rise over the next several years.

Following the field observations and interviews, we contacted a number of industry experts¹⁹ to discuss best-demonstrated practices, current operational standards, and to gather alternative methods. *Please note that auditing current business practices against current Massachusetts regulations and statutes was outside of the scope of this assignment.* Observations are outlined below, with details following in the next section:

- I. Adopt the ARCI Model Rules of Racing; specific highlights include:
 - a. Commission Stewards and Judges must be accredited by the Racing Officials Accreditation Program (“ROAP”) and licensed by the United States Trotting Association (“USTA”), respectively.
 - b. Massachusetts medication policy and penalties to align with Racing Medication & Testing Consortium (“RMTC”)/ARCI model rules.
 - i. Testing performed by accredited lab.
 - c. Licensing to include fingerprinting.
 - d. Licensed individuals subject to random drug and alcohol testing.
- II. Upgrade the audit/financial system to automate data process.
- III. Update the licensing system and/or utilize technology to enhance/streamline information management.
- IV. Invest in Human Resources to enhance the professional profile of the SRC/MGC-Racing Division.

¹⁸ In fact, Section 104, Chapter 194 of the Acts of 2011 (“the Gaming Law”) requires MGC to “... analyze the pari-mutuel and simulcasting laws in effect. ... The analysis shall include a review of the efficacy of those laws and the need to replace those laws pursuant to the continuation of chapters 128A and 128C of the General Laws in this act. ... The commission shall report its findings and recommendations...not later than January 1, 2013.”

¹⁹ See Exhibit 4 for listing

- V. The MGC should arrange for an independent audit of the Racing Division. As noted earlier, the SRC has not had the benefit of such an audit for several years.

Regulatory Reform

As with many states, Massachusetts racing regulations have been updated infrequently. The MGC-Racing Division should champion adoption of the ARCI Model Rules of Racing.²⁰ From an implementation standpoint, a working group with a sense of urgency representing key stakeholders should meet to review proposed rule changes. (As mentioned previously in this report, there are currently proposed rule changes that have languished due to the uncertainty surrounding the SRC governance.) Legal guidance will have to be provided to determine regulatory changes versus those changes that trigger statutory issues. This action should kick off immediately in order to prepare the industry for the 2013 racing season.

Racing Officials Accreditation Status

State Stewards (Thoroughbred) and state Judges (Standardbred) should be accredited through the ROAP and Judges licensed by the USTA. While all Massachusetts Judges and Stewards are experienced, this accreditation process creates a common language and understanding on a national level, as well as signaling to all stakeholders the importance the Commonwealth places on integrity in racing and gaming.

From an implementation perspective, non-accredited Massachusetts Standardbred Judges have an opportunity to participate in a full course this fall (October 15-24, 2012) in Columbus, OH, held by the USTA. Thoroughbred Stewards may have to wait until summer 2013 for their next full course (the University of Arizona and University of Louisville generally alternate offering the course each year). Once receiving accreditation, individuals must maintain 16 hours Continuing Education every two years. Massachusetts racing stakeholders have been reluctant to invest time and money in seeking this professional designation due to the cost and uncertainty surrounding continued racing in the Commonwealth. Other states have opted to pay the costs directly, or split the costs between the state, racetracks and individuals pursuing the designation. In many cases the individuals are wholly responsible for the costs.

²⁰ See Exhibit 3 for ARCI Model Rules

Equine Medication and Testing

Massachusetts racing medication policy lags many other jurisdictions. For example, the Commonwealth still allows race-day administration of phenylbutazone. Massachusetts should adopt the equine medication standards and penalties as advocated by the RMTTC and ARCI.²¹

In order to enforce these standards, improvements must be made in testing. Laboratory Director Bruce Aspeslagh led the Massachusetts Equine Commission Laboratory for many years and the remaining staff carries on his legacy. However, in recent years the SRC has struggled to adequately staff the Director position. Much of the equipment is aged, and it would require a significant capital expense to upgrade much less bring the laboratory to an accredited status. The Commonwealth should consider entering into an RFP process to identify an accredited lab²² that can perform all necessary testing. The chain of custody (i.e., currently includes transport to lab by State Police) should be part of the review and RFP process to identify an experienced secure courier. Given the technical nature, consideration to hiring an expert to assist with RFP development should be given. From an implementation timeline, other jurisdictions contacted have indicated this is about a 90-day process to design an RFP, put out to bid, evaluate and award contract. (Note: specific Massachusetts's requirements may affect that timeline.)

Individual Licensing and Enforcement

Massachusetts does not currently require fingerprinting for racing license applicants. While this practice varies across states, a general guide is to require fingerprints submitted to a national database (FBI) every three to five years. Current Massachusetts racing population may not seem to warrant such a broad background check as all stakeholders (racing associations, commission staff, horsemen's groups) mentioned the close-knit Massachusetts racing community, noting very small amounts of new applicants each year. (Note: SRC Racing Inspectors estimate that only 10 percent to 15 percent of applicants each year are new to Massachusetts. The SRC indicated that racing license data do not allow users to break out renewals from new applicants.) However, given the expected purse increase and mandated increase in racing dates, one could reasonably expect a new influx of prospective applicants, and the increased importance of national background checks.

The current licensing software and hardware have additional limitations noted by MGC-Racing Division staff. Limitations include lack of compatibility with ARCI software, badges

²¹ See Exhibit 3, ARCI Model Rules, Chapter 11

²² "Accredited" can be a source of dispute among experts. At a minimum, this means the lab has received an ISO 17025 designation. Other experts feel additional hurdles should accompany a "lab accreditation" such as a Director with PhD credentials, employment of a full time Quality Control Officer, 10 percent minimum of annual budget devoted to research, minimum of 5,000 samples analyzed per year.

that can be duplicated (no bar code, watermark or other security device) and issues with current camera/printer functions which result in distorted badge photos on credentials.

Random Drug Testing (Human)

The ARCI Model Rules include provisions for random drug testing (human) for individuals that can affect the outcome of a race including all licensed individuals with access to the racehorse.²³ Due to prior Massachusetts case law²⁴ this practice has not been ongoing at Suffolk Downs. Current Suffolk Downs management is developing a comprehensive drug and alcohol policy. Plainridge management noted that all drivers are subject to daily Breathalyzer testing per USTA policy, and that random drug tests are supported/endorsed by their horsemen's group.

Revenue and Tote Audit

The SRC currently has five employees designated as auditors. Four audit staff work in the field – three in place at each pari-mutuel facility with one supervisor at Suffolk Downs. The field auditors calculate revenues due to the Commonwealth through various commissions, outs, breakage, etc. This information is then compared to the racing association's financial data and any differences are reconciled. Weekly data are submitted to the Boston office. The process used by the field auditors is labor-intensive – they manually input handle (revenue) data into an Access database that is used to run the commission calculations.

From an implementation standpoint, this process can be automated in a number of ways, including keeping the existing software but updating it to accept daily downloads of tote data.²⁵ Consideration should also be given to a more robust solution such as CHRIMS, software that was originally created to provide accounting and audit for California's horse racing industry. (Given the desire expressed by the NEHBPA for more timely and transparent purse account audits, perhaps the cost of installation could be shared among other stakeholders.)

In either case, current audit work could then be consolidated to a much smaller work group, or resources redeployed to perform other audit functions. In some jurisdictions, state auditors still "spot check" pari-mutuel odds calculations and resulting payouts. The MGC-Racing Division may consider employing a third party (such as GLI) to audit tote systems on an occasional basis (i.e., every five years). Considerable work and investigation into wagering integrity has been instituted by the Thoroughbred Racing Protective Bureau. The MGC-Racing

²³ See Exhibit 3 ARCI Model Rules, Chapter 8, Section 4.

²⁴ See Exhibit 5 for *HBPA v. SRC*

²⁵ Exhibit 2 for information on current software provided by Arthur Evans

Division and/or Massachusetts track associations should monitor the development of these business systems for further consideration as commercial applications become available.

Business Processes and Technology

Throughout the SRC's work product, there tends to be a reliance on manual procedures. For example, the Judges' and Stewards' decisions including exclusions are maintained in hard-copy form in a three-ring binder at each track. Available technology today allows for greater distribution and transparency such as posting rulings on an MGC-Racing Division website and maintaining an exclusion database with photos for use by track security and commission staff.²⁶

Human Resources/Operational Notes

The MGC-Racing Division should require adherence to human resources standards (i.e., employee handbook and training on policies and procedures), including a no-nepotism policy, appearance standards, and moonlighting guidelines. The MGC-Racing Division should further promote a professional atmosphere throughout the organization, including the barn/paddock staff; this should include appearance standards, inclusive of MGC uniforms i.e. shirts and hats for a more professional appearance.

The MGC-Racing Division should modernize its timekeeping and scheduling. Per staff we interviewed, a new email-based attendance verification system is being rolled out by the DLP (review of such system was out of scope for this project). As responsibility is transitioned over to the MGC, a cost-benefit analysis to installing a robust timekeeping system should be explored (i.e., fingerprint scanners linked to time keeping system), especially given the multiple locations and low supervisory ratio. Capital expense could potentially be shared with/spread over management of the MGC employee base. The MGC-Racing Division should further conduct a review of hours of operation and manpower scheduling to ensure staff is aligned to business demands.

²⁶ Examples see Texas Racing Commission and New Jersey Racing Commission websites

Suggested Next Steps

Given (a) the January 1, 2013, mandate presented in Section 104 re: reviewing and updating racing regulations, (b) the need to prepare for 2013 racing seasons, and (c) the uncertainty that is negatively impacting SRC professionals and decision-making, the MGC should immediately:

- Empower resources (internal or external) to:
 - Convene stakeholder reviews of gaps between current statutes and regulations and the ACRI Model Rules of Racing.
 - With legal counsel, determine any statutory barriers to regulatory reform and develop plans to address said barriers.
 - Develop RFP to outsource equine testing.
 - Develop plans for accreditation of Judges and Stewards.
 - Work with MGC leadership and Human Resources professionals to develop organizational needs/job descriptions for 2013 racing regulatory staff and contract labor and transition plan for current staff/contract labor.
 - Perform needs assessment for audit/finance and licensing software solutions.
 - Arrange for an independent audit of the MGC-Racing Division.
 - Build 2013 budget to support new regulatory landscape.

The State Racing Commission work and the greater racing industry within the Commonwealth has a long and often distinguished history. But time and changing circumstances have put its legacy at risk. The Massachusetts Gaming Commission must take action now to assure the integrity and efficiency of the current system, and to position the industry to compete effectively for future growth and prosperity. By investing time and resources now, the industry will be ready for future growth with modern regulation under the leadership of the new MGC.

Appendix

These exhibits appear on the following pages:

- | | |
|------------------|--|
| Exhibit 1 | Massachusetts State Racing Commission organizational chart |
| Exhibit 2 | Statement of Arthur Evans concerning Tracknology software for licensing and financial management |
| Exhibit 3 | The Association of Racing Commissioners International's Model Rules of Racing, Version 5.1 (<i>included separately due to file size</i>) |
| Exhibit 4 | Industry and Massachusetts racing sources |
| Exhibit 5 | Case law: Supreme Judicial Court of Massachusetts, <i>Horsemen's Benevolent and Protective Association, Inc. v State Racing Commission</i> , January 9, 1989 |

Division of Professional Licensure, State Racing Commission

Exhibit 1

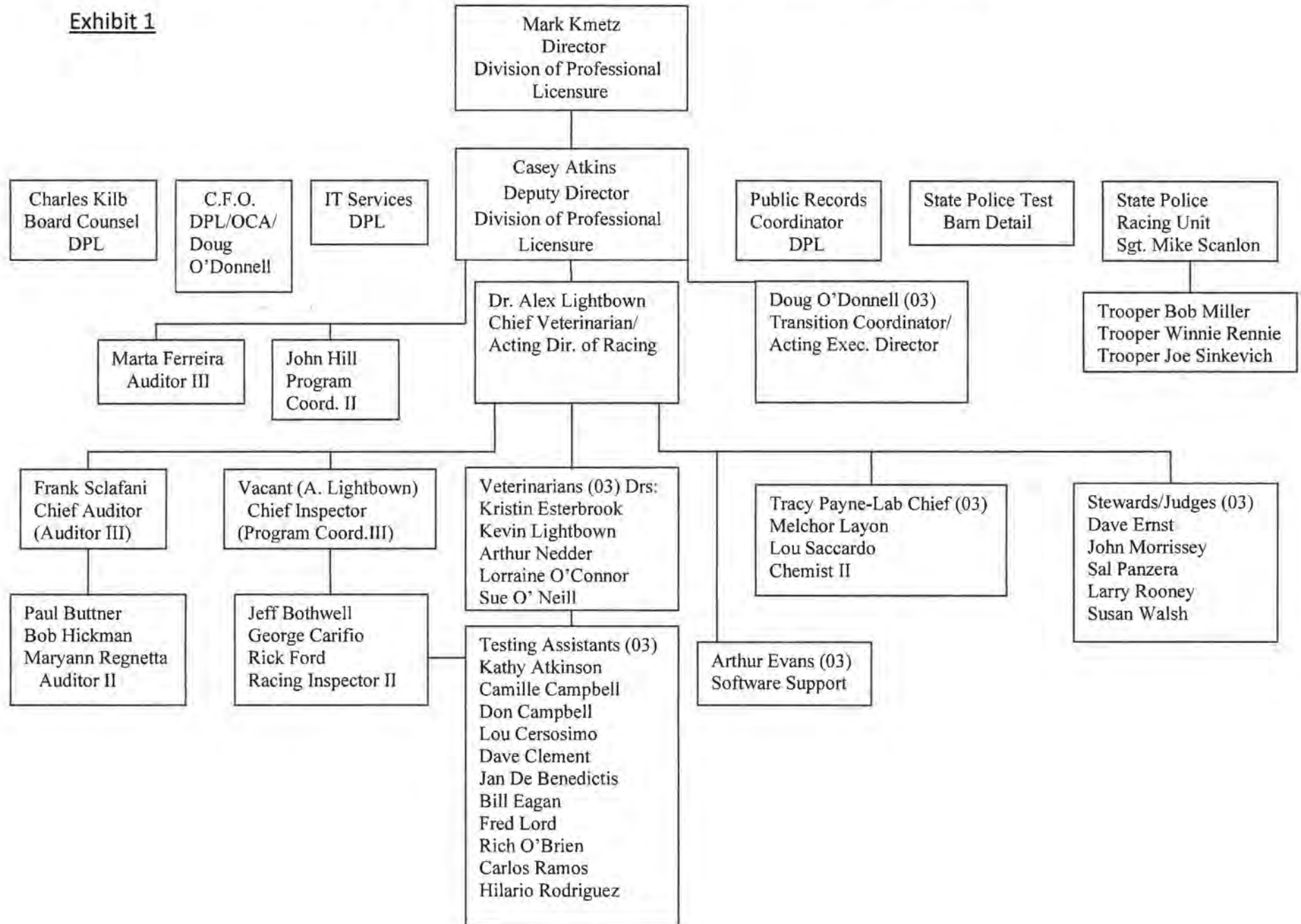


Exhibit 2

Arthur Evans, Tracknology
Software for Licensing and Financial Management

The Financial Reporting System (FRS) was developed in Visual Basic 6 / Microsoft Access. FRS tracks all revenue received for betting at all Massachusetts race tracks and State Fairs for live and simulcast performances, and all revenue received off-track from simulcast of Massachusetts' Thoroughbred, Harness, and Greyhound races. One system is installed at each of the racetracks with a master system at the main office in Boston that receives data via upload from the tracks for Period information and allows for deposit reconciliation and additional comparative / statistical reporting. The system provides for easy modification of percentage, track, and contract information. All data is centralized in Boston. Enhancements and upgrades been on-going over the years. Upgraded from Access 2003 to Access 2007 (2008). Modified to support new financial requirements (2009-2010). Installed on Windows 7 (2011).

The Racetrack Licensing System (RLS) was developed in Visual Basic 6 / Microsoft Access to store and track all persons licensed to operate at Massachusetts' racetracks, including Jockeys, Owners, Racing Officials, Trainers, Kennels, Stables, etc. RLS tracks a complete history of licenses for each licensee, allows maintenance of Status records, and streamlines the Receipt process allowing the Commission to maintain tighter controls over revenue. RLS produces Revenue, Deposit, Receipt, and Transaction History reports and is installed at all of the state's racetracks and at the main office in Boston. Turnkey efforts included design, coding, testing, implementation, training, documentation, and on-going support. Enhanced RLS (2004-2005) to include photo imaging. The new system integrated a video camera and allows user to snap images of licensees on-line, print badges using NISCA printers, store/retrieve history of photos, generate Licensee dossiers, etc. Licensee Dossiers are provided to the State Police. Also added and upgraded reports and other functionality, such as Export of data for use by the Department of Revenue (child support check). Modified to extract data and send to Boston (2005-2006). Upgraded for new cameras and integrated webcam software at all tracks (2008-2009). Developed new features and reports to include enhanced License History on Dossier, listing of Licensees On Hold, new Stable Name, Partnerships/ Kennel fields and reports (2010-2011).

Additional upgrades which have been discussed but not approved for the systems include updating RLS printers and software for Badges which can swiped at track entrances, enhancing FRS to accept an import of data directly from the AmTote and United Tote, and possibly upgrading the software platform. I would welcome the opportunity to discuss and participate in future upgrades.

Exhibit 4

Industry sources included

Joe Gorajec
Executive Director
Indiana Racing Commission

Keith Johnson
Vice President
AmTote

T.C. Lane
Director – Officials, Registrar, Member Services
United States Trotting Association

Patricia Nalle
Director of Information Services
Texas Racing Commission

Chris Scherf
Executive Director
Thoroughbred Racing Association

Dr. Lawrence R. Soma, VMD, DACVA
Professor of Anesthesia and Marilyn M. Simpson Professor of Veterinary
Medicine
University of Pennsylvania, School of Veterinary Medicine
New Bolton Center Campus

Mike Tanner
Executive Director
United States Trotting Association

Mark Thurman
CEO & President
CHRIMS, Inc.

Cornelius E. Uboh, Phd
Director
PA Equine Toxicology & Research Laboratory

Scot Waterman, DVM
Veterinary and Testing Consultant to the Arizona Department of Racing and the

Indiana Horse Racing Commission
Former Director, Racing Medication & Testing Consortium

John Wayne
Executive Director
Delaware Thoroughbred Racing Commission

Frank Zanzuccki
Executive Director, NJ Racing Commission

Massachusetts racing, Commission and DLP sources included

Casey Atkins
Deputy Director for Policy & Boards
Division of Professional Licensure

Jeff Bothwell
Inspector
Division of Professional Licensure

George Brown
Massachusetts Thoroughbred Breeders Association

George Carney
President
Raynham Park

Arthur Evans
Tracknology (software provider)

Paul Evans
Director Security & Compliance
Suffolk Downs

Marta Ferreira
Auditor IV
Division of Professional Licensure

Robert Furlong
Former State Racing Commissioner

Jim Green
The Eighth Pole

Bob Hickman
Auditor
Division of Professional Licensure

John Hill
Program Coordinator III
Division of Professional Licensure

Gray Holmes
Chief Financial Officer
Office of Consumer Affairs

Charles Kilb
Board Counsel
Division of Professional Licensure

Dr. Alex Lightbown
Chief Veterinarian / Director of Racing/Chief Inspector
Division of Professional Licensure

Karen Malone
Director of Human Resources
Office of Consumer Affairs

Doug O'Donnell
Transition Coordinator
Division of Professional Licensure

Steve O'Toole
General Manager
Plainridge Racecourse

Bruce Patton
Executive Director
New England Horseman's Benevolent and Protection Association

Mike Perpall
President
New England Harness Horsemen's Association

Gary Piontkowski
President & CEO
Plainridge Racecourse

Maryann Regnetta
Auditor II
Division of Professional Licensure

Lou Saccardo
Chemist II
Division of Professional Licensure

Frank Scalfani
Chief Auditor
Division of Professional Licensure

Chip Tuttle
Chief Operating Officer
Suffolk Downs

Joseph Vandeventer
Former State Racing Commissioner (Chairman)

Susan Walsh
Steward
Division of Professional Licensure

Exhibit 5

Supreme Judicial Court of Massachusetts.
 HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC.

v.

STATE RACING COMMISSION.

Jan. 9, 1989.

Suit was brought in the Supreme Judicial Court for **Suffolk** County seeking declaration that State Racing Commission's "human **drug** testing" regulation was unconstitutional. On transfer, the Superior Court, **Suffolk** County, George A. Sullivan, Jr., J., ruled that the program violated the Fourth Amendment and permanently enjoined the Commission from coercing licensees to submit to urine testing. Application for direct appellate review was granted. The Supreme Judicial Court, Hennessey, C.J., held that: (1) regulation authorizing random testing of licensees, including owners, trainers, veterinarians, blacksmiths, stable employees, **jockeys**, and **jockey's** apprentices or agents, does not fall within administrative search exception warrant requirement of Massachusetts Constitution, and thus is unconstitutional, and (2) regulation providing for **drug** testing of any licensee upon "reasonable suspicion," as defined in regulation, violates Massachusetts Constitution; provision for **drug** testing upon reasonable suspicion would be constitutionally valid only if, as defined and as applied, requisites of probable cause were met.

Affirmed.

Liacos, J., filed concurring opinion.

Nolan and Lynch, JJ., filed separate dissenting opinions.

West Headnotes

[1] Searches and Seizures 349 14

349 Searches and Seizures
349I In General

349k13 What Constitutes Search or Seizure
349k14 k. Taking Samples of Blood, or Other Physical Specimens; Handwriting Exemplars.
[Most Cited Cases](#)

Requiring individual to submit urine specimen, under supervision of monitor, and subjecting specimen to chemical analysis is "search and seizure" for purposes of Massachusetts Constitution. [M.G.L.A. Const. Pt. 1, Art. 14.](#)

[2] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and Tests; Identification Procedures. [Most Cited Cases](#)

State Racing Commission's regulation authorizing random **drug** testing of licensees, including owners, trainers, veterinarians, blacksmiths, stable employees, **jockeys**, and **jockey's** apprentices or agents, does not fall within administrative search exception warrant requirement of Massachusetts Constitution, and thus is unconstitutional. [M.G.L.A. Const. Pt. 1, Art. 14.](#)

[3] Searches and Seizures 349 78

349 Searches and Seizures
349I In General
349k78 k. Samples and Tests; Identification Procedures. [Most Cited Cases](#)

Random **drug** testing in industry cannot be justified solely by, or hinge on, extent to which industry is heavily regulated; rather, more important inquiry under Massachusetts Constitution focuses on individual's reasonable expectations of privacy which are not necessarily dependent on amount of regulation in particular industry. [M.G.L.A. Const. Pt. 1, Art. 14.](#)

[4] Searches and Seizures 349 78

349 Searches and Seizures
349I In General

349k78 k. Samples and Tests; Identification Procedures. Most Cited Cases

State Racing Commission's regulation providing for **drug** testing of any licensee upon "reasonable suspicion," as defined in regulation, violates Massachusetts Constitution; provision for **drug** testing upon reasonable suspicion would be constitutionally valid only if, as defined and as applied, requisites of probable cause were met. M.G.L.A. Const. Pt. 1, Art. 14.

*693 **645 Jamin Ben Raskin, Asst. Atty. Gen., for State Racing Com'n.

Charles R. Dougherty (Marjorie Heins & William B. Forbush, Boston, with him) for plaintiff.

Americo A. Salini, Jr., Medford, for Massachusetts Teachers Ass'n, amicus curiae, submitted a brief.

Carol Calliotte & Joseph G. Sandulli, Boston, for Massachusetts Coalition of Police, amicus curiae, submitted a brief.

Before *692 HENNESSEY, C.J., and WILKINS, LIACOS, ABRAMS, NOLAN, LYNCH and O'CONNOR, JJ.

HENNESSEY, Chief Justice.

The plaintiff filed suit in the Supreme Judicial Court for Suffolk County seeking a declaration that the "human **drug** testing" regulation adopted by the State Racing Commission (commission), 205 Code Mass.Reg. § 4.57 (1986), violates the Fourth and Fourteenth Amendments to the United States Constitution, arts. 1, 10, 12, and 14 of the Massachusetts Declaration of Rights, the Massachusetts Civil Rights Act, G.L. c. 12, § 11 (1986 ed.), and the right of privacy statute, G.L. c. 214, § 1B (1986 ed.), and that the regulation's provision permitting immediate suspension of licensees who test positive or who refuse to provide a urine sample, violates the procedural due process guarantees of the Fourteenth Amendment and art. 12. The regulation institutes a broad program of testing at random of persons within the class, and also of persons who are under "reasonable suspicion" of **drug** use. The plaintiff sought preliminary and permanent injunctions against the commission to enjoin any **drug** testing. A single justice of this court

transferred the case to the Superior Court in Suffolk County. G.L. c. 211, § 4A (1986 ed.).

The Superior Court judge denied the plaintiff's motion for a preliminary injunction. The plaintiff appealed to a single justice of the Appeals Court. The single justice issued an injunction, enjoining the defendant from implementing the **drug** testing program pending submission to the Superior Court of a *694 statement of agreed facts and entry of judgment by the Superior Court. The parties subsequently filed a statement of facts which left open one factual issue for trial—what percentage of initially negative test results were false. The Superior Court judge, after hearing the expert testimony presented by the parties, ruled that "there was not enough evidence presented for making the requested finding of fact" and that "the whole subject of 'false-negatives' ... is speculative." The judge decided the case strictly on the basis of the statement of agreed facts.

The Superior Court judge ruled that the **drug** testing program violates the Fourth Amendment and permanently enjoined the commission from coercing its licensees to submit to the urine testing. Only the defendant**646 appeals. We granted its application for direct appellate review. We agree with the result reached by the Superior Court judge. However, we need not consider this case in the context of the Fourth Amendment, because we now conclude that the **drug** testing program, in both the testing at random and on "reasonable suspicion," is unconstitutional under art. 14 of the Massachusetts Declaration of Rights.^{FN1} We cite and make reference to Fourth Amendment cases only by way of analogy.

FN1. The plaintiff asserts its rights under the Constitution because action by a State agency is shown, in contrast to Bally v. Northeastern Univ., 403 Mass. 713, 532 N.E.2d 49 (1989), where no State action is alleged or shown, and where Bally as a consequence claimed relief by alleging violations of his rights under the Massachusetts Civil Rights Act and the right of privacy statute.

The summary of relevant facts is taken from the statement of agreed facts and its supplement. The plaintiff, the Horsemen's Benevolent and Protective Association, Inc. (association), is a national nonprofit organization which strives to protect the interests of

trainers and owners of thoroughbred horses, and their employees, with respect to the establishment of proper rules and conditions in the horse racing industry. The Massachusetts-New Hampshire division of the association has approximately 4,000 members who are owners or trainers of thoroughbred horses which compete in races the commission licenses and regulates.

*695 The commission has the authority, pursuant to G.L. c. 128A (1986 ed.), to regulate horse and dog racing in Massachusetts. The commission's powers include the prescription of "rules, regulations and conditions under which all horse ... races at horse ... racing meetings shall be conducted..." G.L. c. 128A, § 9. See G.L. c. 128A, § 9A.

In 1986, the commission promulgated the "human drug testing" regulation, 205 Code Mass.Reg. § 4.57 (see Appendix), and issued a "human drug testing policy and procedure" to be followed in enforcing the drug testing regulation. The commission instituted its drug testing program based on its determination that it serves the best interest of racing to deter the use of illegal drugs at Massachusetts race tracks, and that the use and abuse of illegal drugs by licensees, whether on or off licensed premises, jeopardizes and compromises the safety of the participants, as well as the integrity of the industry. The commission had received information from Suffolk Downs's security and commission personnel regarding drug abuse at the Suffolk Downs racetrack. The efforts of the commission and the State police to investigate drug abuse through conventional means had proved unsuccessful. The parties agree that lay personnel could detect and recognize behavioral changes-tardiness, decrease in workload, and absences-as evidence of possible drug or alcohol abuse.

The regulation prohibits any licensee, while on racing grounds, from having present within his or her system, any controlled substance, as listed in 21 U.S.C. § 812, Schedules I-V (1982), or any wrongfully obtained prescription legend drug. The regulation provides that any licensee-owner, trainer, veterinarian, blacksmith, stable employee, jockey, jockey's apprentice or agent-may be subject to urinalysis based either on reasonable suspicion, or on random, without cause, selection. The parties define "reasonable suspicion" as "the existence of reasonable circumstances, reports, information or reasonable direct

observation ... lead[ing to the belief] ... that a licensee is using illegal drugs." Although the regulation provides that any licensee is subject to random testing or testing based on reasonable suspicion, the policy allows, and, in practice,*696 the commission has conducted, testing only on days that a licensee is "actively participating" in a race. Refusal to provide a sample results in immediate suspension of the licensee for thirty days; readmittance is conditioned on proof of a negative test result.

For the random testing, the stewards place the names of all licensees involved in that day's racing program into a bag. Representatives of the Jockey's Guild and the association are present for the random selection**647 of licensees and are allowed to inspect the names of the pool of licensees. The stewards then notify the persons chosen, by telephone or the public address system at the track, to report to the security office.

The testing procedure is similar for random testing and for testing based on "reasonable suspicion." When each licensee arrives at the security office, a steward gives him or her a bottle with a number and a tag affixed to it and directs the licensee to the bathroom to produce a urine sample. The regulation states that all samples "shall be collected in the presence of a Commission Steward or ... designee." 205 Code Mass.Reg. § 4.57(6). The policy provides, with respect to random testing, that a State trooper, inspector, or designee accompany the licensee while the sample is given and "take every precaution to avoid tampering or counterfeit samples." It states further that a licensee should be afforded maximum privacy, with the designated person remaining outside the bathroom, unless there is reason to believe that the licensee may tamper with the sample. If, however, the testing is based on "reasonable suspicion," the policy requires that the sample be given "in the presence of" a State trooper or a commission inspector, or both. Under the drug testing program as administered by the commission, a plainclothes State trooper and a racing inspector stand outside the bathroom for both random and "reasonable suspicion" testing.

The commission sends the sample in a sealed envelope, with the signatures of the licensee and the commission official on the attached evidence tag, to the commission's laboratory. The laboratory screens each urine sample using thin layer chromatography

for the presence of numerous controlled substances,*697 including cocaine, marihuana, amphetamines, and morphine; the laboratory does not screen for the presence of barbiturates or other "hypnotics" unless specifically instructed to do so.

After an initial positive indication of the presence of a controlled substance, the laboratory then conducts thin layer chromatography and gas chromatography/mass spectrometry (gc/ms) to confirm the initial positive test result. Only a confirmed positive test result is treated as positive. The laboratory does not confirm initial negative test results. The parties disagree, and the Superior Court judge was unable to determine, what percentage of initial negative results are false, inaccurately indicating an absence of controlled substances in urine samples which, in fact, do contain one or more controlled substances.

The gc/ms screening is approximately 99% accurate, absent human or mechanical error. The gc/ms test does not, however, eliminate the possibility of false positives due to inaccurate adjustment of the mass spectrometer, contaminated instruments, temperature changes, insufficient skill or training of the laboratory technicians, or problems with the validity or chain of custody of the sample. The laboratory, however, tunes the mass spectrometer daily and verifies that the instruments are not contaminated.

A positive test result for the presence of a controlled substance does not establish that a licensee was intoxicated or otherwise physically or mentally impaired at the time that the licensee gave the urine sample. A person's urine may test positive for the presence of marihuana for several weeks after ingestion although marihuana intoxication endures for not more than two hours. Similarly, a person's urine may test positive for the presence of cocaine even two or three days after ingestion although cocaine intoxication endures for less than one hour. A positive test result does not establish that an individual is addicted or **drug** dependent. In fact, a positive test result for the presence of marihuana may be caused by mere exposure to marihuana smoke, i.e., passive inhalation.

A positive test result may lead to immediate suspension "pending the outcome of a hearing" if it is deemed to be in *698 the best interest of racing to do so. If, after a hearing, a licensee is determined to have

had a controlled substance in his or her system, he or she must submit to a "professional evaluation." If the professional evaluation reveals that the licensee is addicted**648 or that his or her condition is detrimental to the best interest of racing, the licensee will not be allowed to participate in racing until he or she produces a negative test result and proof of successful completion of a certified **drug** rehabilitation program approved by the commission, and must agree to further testing at the discretion of the stewards or commission representative to ensure that the licensee is no longer impaired. If the evaluation does not show that the licensee is addicted or detrimental to the best interest of racing, the licensee is allowed to continue to participate in racing, provided he or she produces a negative test result, and agrees to further testing.

After a second violation, a licensee will be suspended and allowed to enroll in a certified **drug** rehabilitation program approved by the commission. The licensee will be reinstated only if the commission, after a hearing, determines that licensing the person is not detrimental to the best interest of racing. If reinstated, the licensee is subject to testing indefinitely.

Between December 8, 1986, and January 12, 1987, when the commission was implementing the regulation and before it was enjoined from doing so, the commission required four licensees to provide a urine sample on the basis of "reasonable suspicion," three of whom tested positive-one for the presence of marihuana, and two for the presence of cocaine. The stewards randomly selected eleven licensees for testing, four of whom tested positive-three for the presence of marihuana, and one for the presence of marihuana and cocaine. Each licensee who tested positive was immediately suspended, and given a hearing which confirmed the suspension the same day.

We address the constitutionality of the regulation under art. 14. Because we conclude that the regulation violates art. 14, we do not address the association's claims under the Fourth Amendment, the Massachusetts Civil Rights Act, G.L. c. 12 § 11I, the right of privacy statute, G.L. c. 214, § 1B, or the procedural due process guarantees of the Fourteenth Amendment and art. 12.

*699 [1] Requiring an individual to submit a urine specimen, under the supervision of a moni-

tor,^{FN2} and subjecting that specimen to chemical analysis constitutes a search and seizure for constitutional purposes under art. 14. Almost every court that has addressed this issue has determined that urinalysis is a search and seizure which implicates the Fourth Amendment's protection of an individual's expectation of privacy. See, e.g., *Lovvorn v. Chattanooga*, 846 F.2d 1539, 1544 (6th Cir.1988); *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 579-580 (9th Cir.), cert. granted, 486 U.S. 1042, 108 S.Ct. 2033, 100 L.Ed.2d 618 (1988); *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir.1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C.Cir.1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir.1987), cert. granted, 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir.1987); *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir.1986); *Smith v. White*, 666 F.Supp. 1085, 1089 (E.D.Tenn.1987); *Capua v. Plainfield*, 643 F.Supp. 1507, 1513 (D.N.J.1986). But see *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1009-1011 (D.C.1985) (Nebeker, J., concurring) (stating that urine collection is similar to voice and handwriting exemplars which are not within an individual's expectation of privacy). Similarly, art. 14 protects personal privacy and dignity against unwarranted intrusion.

^{FN2}. The policy requires monitored urination only in the case of testing based on reasonable suspicion, or when there is reason to believe that an individual may tamper with the urine specimen. Under the procedure implemented by the commission, authorized officials stood outside the bathroom door. We judge the regulation on its face.

Urination is one of the most private of all activities. "The subjective expectation of privacy felt by many individuals when urinating is undoubtedly one that society is prepared to consider reasonable." *Lovvorn*, *supra* at 1542-1543. "Most people describe [urination] by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is **649 generally prohibited by law as well as social custom." *Von Raab*, *supra* at 175.

*700 Moreover, an individual has reasonable expectations of privacy regarding the information which can be extracted from a urine specimen. *Amer-*

ican Fed'n of Gov't Employees, Council 33 v. Meese, 688 F.Supp. 547, 551 (N.D.Cal.1988), citing *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 580 (9th Cir.1988). "One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds." *McDonell v. Hunter*, 612 F.Supp. 1122, 1127 (S.D.Iowa 1985), aff'd as modified, 809 F.2d 1302 (8th Cir.1987). See *Penny v. Kennedy*, 846 F.2d 1563, 1566 (6th Cir.1988) (stating that one can reasonably expect that his or her urine will not be exposed to sophisticated chemical analysis providing an abundance of personal information).

Urinalysis may disclose, in addition to the presence of **drugs**, other personal information-whether a person is taking medication for depression or epilepsy, is suffering from diabetes, or, in the case of a woman, is taking birth control pills, or is pregnant. *Von Raab*, *supra* at 175-176.

[2] Having concluded that urinalysis constitutes a search and seizure under art. 14, we must determine whether the commission's program constitutes an unreasonable search and seizure. The regulation authorizes random testing, as well as testing based on individualized suspicion. We first discuss the random testing.

Ordinarily, a search and seizure must be accompanied by a search warrant issued on probable cause. *Commonwealth v. Tarver*, 369 Mass. 302, 306, 345 N.E.2d 671 (1975). *Commonwealth v. Pignone*, 3 Mass.App.Ct. 403, 410, 332 N.E.2d 388 (1975) (stating that warrantless searches are per se unreasonable). See *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1985); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2031-2032, 29 L.Ed.2d 564 (1971). A limited number of exceptions to the warrant requirement do exist. See, e.g., *Commonwealth v. Helme*, 399 Mass. 298, 302-303, 503 N.E.2d 1287 (1987) (discussing plain view exception); *Commonwealth v. Brillante*, 399 Mass. 152, 156, 503 N.E.2d 459 (1987) (search incident to arrest exception); *Commonwealth v. Gliniewicz*, 398 Mass. 744, 749-750, 500 N.E.2d 1324 (1986) *701 inventory search exception); *Commonwealth v. Ford*, 394 Mass. 421, 426-427, 476 N.E.2d 560 (1985) (storage search exception); *Commonwealth v. Huffman*, 385 Mass. 122, 124-127,

430 N.E.2d 1190 (1982) (exigent circumstances). See also *T.L.O.*, *supra* 469 U.S. at 340, 105 S.Ct. at 742, quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277, 93 S.Ct. 2535, 2541, 37 L.Ed.2d 596 (1973) (Powell, J., concurring).

The commission, in its argument to this court, relies heavily on the administrative search exception to the warrant requirement as applied to the random drug testing of jockeys in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986). In *Shoemaker*, the court upheld the random drug testing by urinalysis of officials, jockeys, trainers, and groomers, under the administrative search exception. The court based its decision on what it found to be a strong State interest, coupled with a reduced justifiable privacy expectation in the heavily regulated horse racing industry.

Several courts have distinguished, criticized, and rejected the *Shoemaker* decision. *Penny v. Kennedy*, *supra* at 1566 (rejecting *Shoemaker*). *Lovvorn*, *supra* at 1544-1547 (criticizing and rejecting *Shoemaker*, referring to its approach as “simplistic and intellectually indefensible”). *Burnley*, *supra* at 584-585 (distinguishing *Shoemaker*). *National Fed'n of Fed. Employees v. Carlucci*, 680 F.Supp. 416, 431 n. 3 (D.D.C.1988) (distinguishing *Shoemaker*). *Police-men's Benevolent Ass'n of N.J. v. Washington Township*, 672 F.Supp. 779 (D.N.J.1987) (distinguishing *Shoemaker*), rev'd, 850 F.2d 133 (3d Cir.1988). *Taylor v. O'Grady*, 669 F.Supp. 1422, 1442 (N.D.Ill.1987) (distinguishing *Shoemaker*). *Feliciano v. Cleveland*, 661 F.Supp. 578, 591 (N.D. Ohio 1987) (distinguishing *Shoemaker*). *American Fed'n of Gov't Employees v. Weinberger*, 651 F.Supp. 726, 734-735 (S.D.Ga.1986) (distinguishing and criticizing *Shoemaker*). *Capua v. Plainfield*, 643 F.Supp. 1507, 1515 (D.N.J.1986) (distinguishing *Shoemaker*). *Fraternal Order of Police, Newark Lodge No. 12 v. Newark*, 216 N.J.Super. 461, 469, 524 A.2d 430 (1987) (distinguishing *Shoemaker*). *Caruso v. Ward*, 133 Misc.2d 544, 506 N.Y.S.2d 789 (N.Y.Sup.Ct.1986) (distinguishing *Shoemaker*, and noting that *Shoemaker* may be “simply out of step with the rest of the authorities”), aff'd, 131 A.D.2d 214, 520 N.Y.S.2d 551 (N.Y.1987).

*702 Few courts have followed the *Shoemaker* decision, and then only in areas involving security and public safety. *National Treasury Employees Un-*

ion v. Von Raab, 816 F.2d 170, 179-180 (5th Cir.1987) (analogizing customs service officials to a highly regulated industry). *McDonell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir.1987) (correction officers). *Rushton v. Nebraska Pub. Power Dist.*, 653 F.Supp. 1510, 1524-1525 (D.Neb.1987) (nuclear power plant employees), aff'd, 844 F.2d 562 (8th Cir.1988).

We now join those courts that have criticized and rejected the *Shoemaker* decision. The administrative search exception to the warrant requirement historically has applied to the search of premises, not individuals. *Taylor v. O'Grady*, *supra* at 1442. See, e.g., *G.L. c. 94C, § 30* (1986 ed.) (administrative inspections of pharmacies); *Commonwealth v. Lipomi*, 385 Mass. 370, 380, 432 N.E.2d 86 (1982) (discussing requirements of warrantless administrative searches of commercial property); *Commonwealth v. Accaputo*, 380 Mass. 435, 438-439, 404 N.E.2d 1204 (1980) (business premises of pharmacies); *Commonwealth v. Cadoret*, 15 Mass.App.Ct. 654, 657-659, 447 N.E.2d 685 (1983) (warrantless inspections of social clubs). See also *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 2647, 96 L.Ed.2d 601 (1987) (administrative inspection of commercial property at automobile junkyard); *Donovan v. Dewey*, 452 U.S. 594, 598-599, 101 S.Ct. 2534, 2537-2538, 69 L.Ed.2d 262 (1981) (inspections of underground mines); *United States v. Biswell*, 406 U.S. 311, 313-317, 92 S.Ct. 1593, 1594-1597, 32 L.Ed.2d 87 (1972) (inspection of firearms dealer's premises). The permission granted to conduct warrantless administrative searches stems from a reduced “expectation of privacy that the owner of commercial property enjoys” (emphasis added). *Donovan v. Dewey*, *supra*. The doctrine exists, with its relaxed standard, “because the inspections are [not] personal in nature.” *Lovvorn*, *supra* at 1546, quoting *Camara v. Municipal Court*, 387 U.S. 523, 537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967).

Even if we assume, which we do not, that the United States Court of Appeals for the Third Circuit properly decided the *Shoemaker* case under the Fourth Amendment, we must diverge from that court's analysis on the basis of art. 14 of the Massachusetts Declaration of Rights. We have previously stated that *703 art. 14, in some circumstances, affords more substantive protection to individuals than prevails under the Fourth Amendment. *Commonwealth v. Blood*, 400 Mass. 61, 67-75, 507 N.E.2d

1029 (1987). *Commonwealth v. Ford*, 394 Mass. 421, 426, 476 N.E.2d 560 (1985). *Commonwealth v. Upton*, 394 Mass. 363, 373-374, 476 N.E.2d 548 (1985).

[3] We reject the argument that random **drug** testing in an industry can be justified solely by, or hinges on, the extent to which that industry is heavily regulated. See *Penny v. Kennedy*, 846 F.2d 1563, 1566 (6th Cir.1988); *Lovvorn v. Chattanooga*, 846 F.2d 1539, 1545 (6th Cir.1988).^{FN3} **651 The more important inquiry, under an art. 14 analysis, focuses on an individual's reasonable expectations of privacy which are not necessarily dependent on the amount of regulation in a particular industry.

^{FN3}. The dissenters in this case rely on the fact that racing is a heavily regulated industry. This approach, if it were sound, would logically permit random **drug** testing of participants in the following heavily regulated industries where the State interest, as in the case of racing, is in protecting the integrity of the industry: *Opinion of the Justices*, 401 Mass. 1211, 1219, 515 N.E.2d 1169 (1987) (savings banks); *Nationwide Mut. Ins. Co. v. Commissioner of Ins.*, 397 Mass. 416, 424, 491 N.E.2d 1061 (1986) (automobile insurance industry); *Johnson v. Martignetti*, 374 Mass. 784, 793, 375 N.E.2d 290 (1978) (all major aspects of the liquor industry); *Massachusetts Ass'n of Independent Ins. Agents & Brokers, Inc. v. Commissioner of Ins.*, 373 Mass. 290, 295, 367 N.E.2d 796 (1977) (insurance industry); *Commonwealth v. Eagleton*, 402 Mass. 199, 202-207, 521 N.E.2d 1363 (1988) (automobile body shops and used car lots). Are employees of these several heavily regulated industries, if the State monitoring agencies should so decide, to be subjected to random **drug** testing by urinalysis, in the face of State interests which have nothing to do with public health and safety? We think not. Compare *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.1988) (railroad employees involved in accidents); *Lovvorn v. Chattanooga*, *supra* at 1546-1547 (irretrievable catastrophe). We express no opinion at this time as to the result we would reach if we were confronted with a case in which the State interest concerned such public safety considerations.

General Laws c. 128A, §§ 9 and 9A, govern horse and dog racing in the Commonwealth, granting the commission power to regulate horse and dog races. G.L. c. 128A, § 9. Section 9A addresses licensing, registering, uniform fees, names, colors, partnership agreements and specifically enumerates personnel requirements-fingerprinting and wearing a photograph badge. G.L. c. 128A, § 9A. The commission also has the power "to search the person, or enter and search the buildings,*704 stables, room, vehicles or other places ... [on] the grounds." 205 Code Mass.Regs. § 4.17(27). This statutory scheme does not diminish the reasonable expectations of privacy that all licensees have in urinating and in the chemical content of their urine.^{FN4}

^{FN4}. The association has not argued that the commission lacks authority to promulgate the "human **drug** testing" regulation, including the provision for the random **drug** testing of all licensees. We do not suggest by our silence on this unargued question that the commission has such authority by implication. See *Life Ins. Ass'n of Mass. v. Commissioner of Ins.*, 403 Mass. 410, 413-418, 530 N.E.2d 168 (1988).

Having decided that the commission's **drug** testing program does not fall under the administrative search exception, as interpreted under art. 14, we assess the reasonableness of the regulation by balancing the commission's need to conduct a random search against the invasiveness of the search and seizure. See *Commonwealth v. Shields*, 402 Mass. 162, 164, 521 N.E.2d 987 (1988). See *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 1499, 94 L.Ed.2d 714 (1987), quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). See *Lovvorn*, *supra* at 1543; *Penny v. Kennedy*, 846 F.2d 1563, 1566 (6th Cir.1988); *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir.1987); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935 (D.C.Cir.1987).

The commission advances as its justifications for the **drug** testing regulation its desire to deter the use of illegal **drugs** in Massachusetts racetracks, and its concern that the use and abuse of illegal **drugs** by licensees, whether on or off licensed premises, compromises the safety and integrity of the industry.

Such laudable concerns cannot justify random **drug** testing because the testing reaches too far into the personal lives of the licensees. Urine screening probes into an individual's private life as surely as if the commission were to enter a licensee's home to search for illegal **drugs**. See *Feliciano v. Cleveland*, 661 F.Supp. 578, 586 (N.D. Ohio 1987). A positive test result for the presence of **drugs** does not indicate **drug** impairment at the time the urine specimen was taken, i.e., a race day. In fact, a test result can indicate the use of marijuana or cocaine long after the **drug** effects have worn off.

*705 One court has suggested that random **drug** testing might be allowed to protect society against "irretrievable catastrophic losses," i.e., lost lives. *Lovvorn v. Chattanooga*, 846 F.2d 1539, 1546-1547 (6th Cir. 1988). See *Rushton*, *supra* at 1524 (discussing the propriety of **drug** testing nuclear plant employees). The commission seeks to prevent improperly won or lost horse races, certainly not irretrievable catastrophes.

The commission must advance a sufficiently compelling reason to justify the highly invasive monitored urine specimen collection it seeks to impose on all licensees. The deterrence, safety, and integrity arguments fail. Random **drug** testing cannot**652 be utilized to ensure the integrity of betting on horse races, nor to serve safety or deterrence values which are merely speculative, and have no basis in the record. Compare *Commonwealth v. LaFrance*, 402 Mass. 789, 792-793, 525 N.E.2d 379 (1988) (upholding search of probationer and her premises on basis of "reasonable suspicion" because of public need to supervise offender for rehabilitation and compliance); *Shields*, *supra* 402 Mass. at 164, 521 N.E.2d 987 (minimally intrusive roadblock search justified by carnage caused by drunk drivers). Compare also *McDonnell v. Hunter*, 809 F.2d 1302, 1308-1309 (8th Cir. 1987) (upholding "reasonable suspicion" **drug** testing of correction officers); *Capua v. Plainfield*, 643 F.Supp. 1507, 1517 (D.N.J. 1986) (requiring "reasonable suspicion" for the **drug** testing of firefighters and police department employees).

Just as in the case of random testing, the regulation's provision for testing of any person under "reasonable suspicion" of **drug** use must also fail. The regulation here merely requires a belief based on report, information, observation, or even "reasonable

circumstances." These vague terms allow impermissibly broad discretion to the stewards, and are an invitation to arbitrary and discriminatory choice of subjects for testing. See *Commonwealth v. McGeoghegan*, 389 Mass. 137, 143, 449 N.E.2d 349 (1983). A vague definition of "reasonable suspicion" could prove more malignant to individual rights than properly conducted random testing.

[4] In the circumstances of this case, a regulation providing for testing on reasonable suspicion must contain the requisites of *706 probable cause. Thus, there must be facts and circumstances sufficient to warrant a prudent person's belief that a licensee more probably than not has used illicit **drugs**. See *Commonwealth v. Upton*, 394 Mass. 363, 370, 476 N.E.2d 548 (1985). This belief must be based on reliable, specific objective facts. Some factors that may affect the reasonableness of the suspicion include the nature of the tip or information, the reliability of the informant, the degree of corroboration, and other facts contributing to the belief. See *Commonwealth v. Upton*, *supra* at 374, 375, 476 N.E.2d 548.^{FN5}

^{FN5}. Even though we refer to the same probable cause requisites that would be required for a search warrant, we are discussing here only the possible consequences of suspension of a licensee's privileges, and not the possible criminality of his conduct.

We conclude that, in the circumstances of this case, art. 14 prohibits random (without cause) **drug** testing by urinalysis of licensees under the human **drug** testing regulation. **Drug** testing upon "reasonable suspicion," as now described and defined in the regulation is also prohibited under art. 14. A provision for **drug** testing upon reasonable suspicion could be constitutionality valid under art. 14 only if, by specific wording and as applied, the requisites of probable cause are met.

JUDGMENT AFFIRMED.

LIACOS, Justice (concurring).

I write separately to indicate my reasons for joining in the result the court reaches in this case. Also, I think it important to express my disagreement with some of the reasons given by the court for its decision. First, I agree with the court's conclusion that both random testing and testing on "reasonable suspi-

cion,” as provided in the regulations of the State Racing Commission, are barred by art. 14 of the Massachusetts Declaration of Rights. My agreement is based on my concurrence with the view that “[r]equiring an individual to submit a urine specimen, under the supervision of a monitor, and subjecting that specimen to chemical analysis constitute a search and seizure for constitutional purposes under art. 14.” I believe, further, for the reasons *707 stated in my separate opinion in *Commonwealth v. Shields*, 402 Mass. 162, 169, 521 N.E.2d 987 (1988), that the reason that such **drug** specimen searches, whether on “reasonable suspicion” or at random, are unlawful is that they are not based on probable cause. See *id.*^{FN1} Thus, I eschew **653 the court’s unnecessary reliance in this case on “balancing” public interests against privacy interests to justify its result. As I pointed out in *Shields*, such an approach is fundamentally flawed. Additionally, if such an approach was “sui generis,” as the court said it was in *Shields*, *supra* at 167, 521 N.E.2d 987, the resurrection of this concept in this case portends the accuracy of my concerns in *Shields* that to engage in a balancing approach is dangerous to fundamental art. 14 values. See *Shields*, *supra* at 174, 176, 521 N.E.2d 987 (Liacos, J., dissenting). It is enough, I think, to conclude that, absent some type of probable cause (and perhaps a warrant or an exigency excusing its absence), general searches of individuals are barred by our State Constitution.

^{FN1}. I agree with the court’s reasoning and rejection of Justice Nolan’s reliance on the “closely regulated industry” approach and also with the rejection of Justice Lynch’s claim that racetrack personnel have no reasonable expectation of privacy.

NOLAN, Justice (dissenting).

The court today has extended the reach of art. 14 to prohibit **drug** testing of all licensees of the State Racing Commission. This is regrettable and not at all required by art. 14.

Historically, the racing industry has been a closely regulated industry. The public interest is significantly high. It does not require much imagination to grasp the mischief which can be produced by licensees under the influence of **drugs**.

The court strains (unpersuasively, I believe) to

remove this case from the well-recognized exception to the warrant requirement in administrative searches. The search here is limited “in time, place, and manner.” *Commonwealth v. Blinn*, 399 Mass. 126, 129, 503 N.E.2d 25 (1987). The comprehensive regulatory scheme requires testing to be carried out on the licensed premises. All licensees have been informed of the testing. Under all these *708 conditions, it is plainly wrong to conclude that the regulation invades a licensee’s reasonable expectation of privacy in contravention of his rights under art. 14.

For these reasons, I dissent.

LYNCH, Justice (dissenting).

For some inexplicable reason it is more acceptable to the court to stop without cause or suspicion and seize average citizens in the course of their lawful activities, *Commonwealth v. Trumble*, 396 Mass. 81, 98, 483 N.E.2d 1102 (1985) (Lynch, J., dissenting, with whom Liacos, J., joins), *Commonwealth v. Shields*, 402 Mass. 162, 169, 521 N.E.2d 987 (1988) (Liacos, J., dissenting, with whom Lynch, J., joins), than it is for a State agency charged with the duty to regulate horse and dog racing to test for the presence of controlled substances those individuals whose activities are already closely and legally scrutinized. In order to reach this curious result, the court applies the balancing test of *Commonwealth v. Trumble*, *supra*, so aptly criticized by Justice Liacos in his dissent in *Commonwealth v. Shields*, *supra*.

In so doing, the court examines the reasonable expectation of privacy of **jockeys** and other licensees of the State Racing Commission (commission) in both the act of urination and the chemical content of their urine. The court bolsters its conclusion by focusing on the fact that the act of urination is ordinarily done in private in order to justify balancing the scales in favor of protecting the privacy interest. This focus is not only mid-Victorian in tone (“[m]ost people describe [urination] in euphemisms if they talk about it at all,” *ante* at 648), but also is misdirected. All that is at stake is the expectation of having one’s urine free from chemical analysis for the presence of **drugs**, not the expectation or privacy during urination. This is so because the monitoring of the act of urination that takes place (having a trooper stand outside the bathroom) is no more of an intrusion on privacy than that which occurs every day at busy restaurants and public functions, if indeed the public facilities are constructed with such solicitude for the sensi-

tivities of the patrons as to permit this degree of privacy.

*709 I see no reason why certain individuals, who must be licensed in order to carry **654 on their activities and are required to be fingerprinted and wear identification badges, should be afforded a greater expectation of privacy than patrons of a busy restaurant in downtown Boston. Thus, it is only the manner in which the Commonwealth gathers its information, i.e., urinalysis, that should concern us. It is in this context that the court should determine whether the procedure is too intrusive to be deemed reasonable. See *McDonnell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir.1987), which is relied upon by the court, and which upheld uniform and random urinalysis of correction officers because, if properly administered, it is not so intrusive as a strip search or a blood test.

The cases cited by the court which discuss the expectation of having one's urine free from chemical analysis do so in the context of holding that "urinalysis" constitutes a search and seizure. However, the issue before us is not whether urinalysis constitutes a "search and seizure" (which it surely is), but rather whether it passes scrutiny under the balancing test the court fashioned in *Commonwealth v. Trumble*, *supra*. The court's focus on the potential chemical secrets contained in a person's urine is beside the point. All that this case involves is a test for the presence of certain illegal **drugs**.

On the other hand, the pervasive harmful influence of **drugs** on contemporary society cannot seriously be denied. It presents a social problem of at least equal magnitude to operating a motor vehicle under the influence of alcohol. The Legislature has determined that racing is an activity that can be conducted in this Commonwealth only under carefully prescribed and limited circumstances. Racing is therefore much different from other licensed activities which are carried on by large segments of the population. In view of the problems **drug** use entails in contemporary society, it is clear that the Commonwealth has a compelling interest in requiring that activities which can be conducted only under its aegis will not be permitted without reasonable assurance that they are free from the pernicious influence of illegal **drugs**.

*710 I would, therefore, balance the scales to

permit the random testing by urinalysis of any licensee who could be reasonably expected to have some influence on the integrity of racing. I do not abandon the view of the dissents in *Trumble* and *Shields*. I would willingly sacrifice the **drug** testing of jockeys for the right of citizens to be free from warrantless seizure absent probable cause or reasonable suspicion. Since I do not have that option, the illusive standards of the court's balancing test lead me to a contrary result.

In addition, I note that the court rejects the concept of testing on the basis of reasonable suspicion, although all the decisions relied on by the court in rejecting random testing have upheld testing based upon reasonable suspicion and have not required probable cause. See, e.g., *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 589 (9th Cir.1988); *Feliciano v. Cleveland*, 661 F.Supp. 578, 587-590 (N.D. Ohio 1987); *Capua v. Plainfield*, 643 F.Supp. 1507, 1516 (D.N.J.1986). See also *Guiney v. Roache*, 686 F.Supp. 956, 959 (D.Mass.1988) (upholding reasonable suspicion testing while rejecting random urinalysis for members of the Boston police department). I see nothing on the record before us that requires the rejection of all testing based on reasonable suspicion. I therefore respectfully dissent.

APPENDIX TO THE OPINION OF THE COURT.
"Human **Drug** Testing" Regulation
205 Code Mass.Reg. § 4.57 (1986)

(1) No person licensed by the Massachusetts State Racing Commission, while on the grounds of a licensed racing association, shall have present within his/her system any controlled substances as listed in Schedule I through V of the U.S.Code, Title 21 (Food and **Drug** Section 812) or any prescription legend **drug** unless such prescription legend **drug** was obtained directly, or pursuant to valid prescription of order from a duly licensed physician who is acting in the course of his/her professional practice. It will be the responsibility of the **655 licensee to notify the Stewards when requested to do so, on forms provided if they are using any prescription **drug**.

*711 (2) The Stewards or any person designated by the Massachusetts State Racing Commission who as a result of information received, report, or personal observation reasonably suspects that a licensee present on the grounds of a licensed association may have present in his/her system any of the controlled

substances mentioned in 205 CMR 4.57(1), shall direct said licensee to deliver a urine specimen to the Commission Steward, or his designee. Said licensee will produce the urine sample without undue delay and may at the discretion of the Commission Steward be required to produce a blood sample taken by a licensed physician or nurse, if unable to produce a urine sample within a reasonable time.

(3) The Stewards, or any person designated by the Massachusetts Racing Commission shall randomly, by lot, at times determined by the Commission, select licensees for **drug** testing. The Stewards or the Commission designee shall direct said licensee to deliver urine specimen to the Commission Steward, or his designee within a reasonable time.

(4) The Stewards, if they reasonably suspect that a licensee may be impaired in any way because of **drugs** or alcohol, shall prohibit said licensee from participating in the day's racing until such time as the licensee produces evidence of a negative **drug** test result, or pending the outcome of a **drug** test, appears before the Stewards and is no longer impaired.

(5) Refusal by said licensee to provide the urine sample shall be a violation of these rules and subject said licensee to immediate suspension. The Stewards, after a hearing, shall suspend for thirty days any licensee who refuses to provide a urine sample. At the conclusion of the thirty day suspension, the licensee will not be re-admitted until he/she produces evidence of a negative test result, acceptable to the Stewards.

(6) All urine samples collected at the direction of the Stewards or the Racing Commission designee shall be collected in the presence of a Commission Steward or his designee and will be sealed and identified by said Steward or designee and remain under their control and custody until the sample is transported to the Racing Commission Laboratory for analysis. The sample will be identified by attaching an evidence tag thereto signed by the licensee and the Racing Commission Official witnessing the collection of the sample.

(7) If after a hearing a licensee is in violation of this rule as a result of a positive test, he/she shall not be allowed to participate in racing until such time as his/her condition has been professionally evaluated to

the satisfaction of the Racing Commission.

(a) After such professional evaluation, if said licensee's condition proves non-addictive and not detrimental to the best interest of racing, said licensee shall be allowed to participate in racing provided he/she can produce a negative test result and agrees to further testing at the discretion of the Stewards or designated Racing Commission representatives, to insure said licensee is no longer using **drugs**.

*712 (b) After such evaluation, if said licensee's condition proves addictive or detrimental to the best interest of racing, said licensee shall not be allowed to participate in racing until such time as he/she can produce a negative test result and show documented proof to the satisfaction of the Stewards that he/she has successfully completed a certified **drug** rehabilitation program approved by the Racing Commission. Said licensee must agree to further testing at the discretion of the Stewards or Racing Commission representative to insure said licensee is no longer impaired.

Positive test results will be reported to the Chairman of the Racing Commission and the Commission Steward who will immediately notify the licensee and schedule a hearing.

A licensee may be suspended pending the outcome of a hearing if it is in the best interest of racing to do so. If after a hearing, a licensee is determined to be in ****656** violation of this rule he/she will have their license suspended until such time as they comply with 205 CMR 4.57(7) and (8).

(8) For a licensee's second violation, he/she shall be suspended and allowed to enroll in a certified **drug** rehabilitation program approved by the Racing Commission. Said licensee will only be reinstated if the Commission, after a hearing, determines that licensing said person is not detrimental to the best interest of racing. If reinstated, said licensee will be subjected to indefinite testing.

Mass., 1989.
Horsemen's Benev. and Protective Ass'n, Inc. v. State Racing Com'n
403 Mass. 692, 532 N.E.2d 644, 57 USLW 2536, 4 IER Cases 147

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Page 12

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