

LAW AND PUBLIC SAFETY

NEW JERSEY RACING COMMISSION

Harness Racing

Rules of Practice and Procedure

Adopted new rule: N.J.A.C. 13:71-1.27 through 1.36

Proposed: July 21, 2008 at 40 N.J.R. 4300(a)

Adopted: October 1, 2008 by the New Jersey Racing Commission,
Frank Zanzuccki, Executive Director

Filed: _____ As R. 2008_____, without change

Authority: N.J.S.A. 5:5-30

Effective Date: November 17, 2008

Expiration Date: June 17, 2010

Summary of Public Comments and Agency Responses:

On September 2, 2008, Michael D. Schottland, Esq. filed comments on behalf of the New Jersey Thoroughbred Horsemen's Association related to proposed rules N.J.A.C. 13:70-1.32 through -1.41 and N.J.A.C. 13:71-1.27 through -1.36. Mr. Schottland also filed Supplemental Comments related to these same proposed rules on September 16, 2008. A summary of these 29 comments and the Commission's response to them are set forth herein. The commentator indicates that his comments also apply to proposed

rules N.J.A.C. 13:71-1.27 through -1.36. The Commission's responses are set forth in the rule adoption related to those rules.

COMMENT 1: The commentator cites to the Summary of proposed rules N.J.A.C. 13:70-1.32 through -1.41 published at 40 N.J.R. 4296 and references the Commission's statement which indicates that "[t]hese rules are being proposed in response to the court's directive in In the Matter of Consider Distribution of the Casino Simulcasting Special Fund (Accumulated in 2005) in the Amount of \$1,820,699.42 Pursuant to N.J.S.A. 5:12-205d, 398 N.J. Super. 7 (App. Div. 2008) [hereinafter 'IMO CSSF'] to promulgate rules pursuant to N.J.S.A. 52:14B-3(2), which set forth the nature and requirements of the Commission's formal and informal procedures." The commentator states that the Summary and many of the proposed rules purport to codify the procedures currently used by the Commission. Referencing IMO CSSF, the commentator asserts that the court found violations of the Open Public Meetings Act ("OPMA"), the Administrative Procedure Act ("APA") and due process of law. The commentator contends that "[t]he Commission should identify the violations found by the Appellate Division, propose rules that correct those violations, and explain how the proposed rules change Commission procedures to conform to applicable law."

RESPONSE: The proposed rules, which are consistent with the requirements of the APA, OPMA and other applicable laws, fully address the issues raised in IMO CSSF. The Commission does not agree that a detailed discussion of the IMO CSSF decision is necessary or warranted in connection with the promulgation of these rules. The court's decision speaks for itself.

The Commission also does not agree that a legal explanation of how the procedures set forth in the proposed rules conform to applicable law is necessary or warranted. In rulemaking, N.J.S.A. 14B-4(a)(2) requires the Commission to prepare and distribute "a statement setting forth a summary of the proposed rule, a clear and concise explanation of the purpose and effect of the rule, [and] the specific legal authority under which its adoption is authorized." The Commission has done so here. N.J.S.A. 14B-4(a)(2) also requires the Commission to address the socioeconomic impact of the rules, a regulatory flexibility analysis, and the impact of the proposed rules on jobs, agriculture and smart-growth development. The Commission has done so.

In addition, N.J.S.A. 52:14B-4(a)(3) requires the Commission to afford all interested persons reasonable opportunity to submit data, views, or arguments in connection with the proposed rules. The Commission has done so through the use of a 60-day

comment period. Pursuant to this subsection and N.J.S.A. 52:14B-4(a)(4), the Commission must consider all submissions fully, prepare a report that identifies the parties who submitted comments, summarize the content of the submissions and respond to each. The Commission has done so here.

COMMENT 2: The commentator references the Social Impact Statement published in connection with the proposed rules which indicates that "[t]he proposed new rules will likely have neither a positive nor negative social impact as they largely codify practices and procedures already utilized by the Commission. The proposed rules may have a positive social impact to the extent that the codification of these procedures facilitates the public's access to this information." The commentator asserts that the proposed rules fail to address the requirements of the IMO CSSF decision and severely restrict the public's access to the Commission.

According to the commentator, proposed rules N.J.A.C. 13:70-1.34 and -1.35 prohibit members of the public from submitting information or comments to the Commission; N.J.A.C. 13:70-1.36 materially restricts the right of the public to seek Commission consideration of issues; N.J.A.C. 13:70-1.37 denies a public hearing and precludes public participation in decision-making related to

distribution of Casino Simulcasting Special Fund monies; N.J.A.C. 13:70-1.38 denies the right to a public hearing regarding the allocation of racing dates and denies all parties, except for the racetracks, the right to address the Commission or otherwise participate in the process. The commentator also asserts that proposed N.J.A.C. 13:70-1.38 would be a material and illegal change from its past practice in which the Commission considered some comment from the New Jersey Thoroughbred Horsemen's Association and other organizations regarding the allocation of racing dates.

The commentator states that the Commission has improperly withheld information and documents from the public in the past. He asserts that to the extent that the proposed rules codify these past practices, "the Social Impact Statement should inform the public that the proposed rules will continue and enhance the secrecy of the Commission's information." The commentator contends that the true intent, purpose and effect of the proposed rules are to restrict public access and participation in the Commission's activities. He asserts that the Social Impact Statement should be revised to reflect his interpretation.

RESPONSE: The Commission disagrees with the commentator's assertions that the proposed rules illegally restrict public access to, or public participation in, the Commission's activities. From

the comments submitted, it appears that the commentator interprets State law as requiring the Commission to allow all persons or entities who wish to do so to participate in the Commission's meetings and be involved in the Commission's decision-making process. The commentator repeatedly relies upon this interpretation, which the Commission does not accept as correct, throughout the rule comments to support his contentions that the proposed rules improperly: prohibit members of the public from submitting information or comments, restrict the right of the public to place issues before the Commission, deny the right to a public hearing in connection with the distribution of the Casino Simulcasting Special Fund monies and the allocation of race dates, deny parties other than racetracks, such as the horsemen's organizations, the right to address the Commission and participate in the process for allocating race dates.

The Commission is statutorily charged with regulating the horse racing industry in New Jersey. Of the nine members who comprise the Commission, two commissioners shall be recommended for nomination by the NJTHA and two commissioners shall be recommended for nomination by the Standardbred Breeders' and Owners' Association of New Jersey. The intent of these appointments is to make known the respective horsemen's interests.

The Commission disagrees with the commentator's view that the "true intent, purpose and effect of the proposed rules is to restrict public access and participation in the Commission's activities." The proposed rules, which inform the public of the procedures the Commission uses, provide for that public access and participation required by law.

The Commission does not agree that proposed rules N.J.A.C. 13:70-1.34 and -1.35 improperly prohibit members of the public from submitting information or comments to the Commission. The OPMA requires the Commission to provide adequate notice of a scheduled meeting to the public. Adequate notice is defined to mean "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda...." N.J.S.A. 10:4-8(d). The OPMA gives the public the right to have advance notice of a public body's meetings and the right to attend these meetings. The OPMA does not grant the public a right to participate in the meeting. N.J.S.A. 10:4-12 clearly states that "[n]othing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting...."

The Commission does not agree that proposed rules N.J.A.C. 13:70-1.34 and -1.35 improperly limit the public's right

to receive notice of and attend the Commission's meetings. Proposed rule N.J.A.C. 13:70-1.34 sets forth a procedure of providing specific notice to "interested parties" at least 30 days prior to an anticipated date upon which the Commission will act informing them of the issues to be considered and the date of anticipated action. "Interested parties" is defined to mean "those persons or entities that are identified by statute and given the express authority to submit applications, comments or other information to the Commission for its consideration before or when reaching a decision at a scheduled meeting." This proposed rule does not limit the public's right to receive the notice of the Commission's meetings required by the OPMA. The proposed rule establishes notice provisions specific to those persons or entities given an express statutory right to submit applications, comments or other information to the Commission.

The Commission does not agree that proposed rule N.J.A.C. 13:70-1.35 improperly limits the public's right to receive notice of and attend public meetings. This proposed rule sets forth the procedure for notifying those "interested parties" identified by statute and given the express authority to submit applications, comments or other information to the Commission of the schedule for the submission of any such information. The proposed rule also

makes provision for the circulation of submitted comments among the "interested parties" and for requests to be heard verbally before the Commission. Subsection (e) of the proposed rule establishes a procedure in which a person or entity that does not have the rights of an "interested party" may request the opportunity to address the Commission verbally at its meeting. Thus, proposed rule N.J.A.C. 13:70-1.35 in no way limits the public's right to receive notice of and attend meetings of the Commission.

The Commission disagrees with the commentator that proposed rule N.J.A.C. 13:70-1.36 materially restricts the right of the public to seek Commission consideration of issues. The proposed rule establishes a procedure that allows any person or entity with an identifiable interest in horse racing, or the parimutuel wagering attendant upon it, to request that a specified issue be placed before the Commission at one of its meetings. The proposed rule makes provision for persons and entities to request that issues be placed before the Commission. The Commission does not agree with the commentator that this rule materially restricts the public from doing so.

The Commission disagrees with the commentator's assertion that proposed rule N.J.A.C. 13:70-1.37 "denies a public hearing and precludes public participation in Casino Simulcasting distribution

decision-making." Under current law, there is no statutory nor other legal requirement that would require the Commission to hold a public hearing in connection with the annual distribution of the CSSF monies and the commentator has not identified any such legal authority. The court in the IMO CSSF decision explained that in distributing the CSSF monies, the principles of "administrative due process" and "administrative fairness" require the Commission to provide the potential recipients of CSSF monies (the racetracks and horsemen's organizations) with "adequate notice, a chance to know opposing evidence, and to present evidence and argument in response." IMO CSSF, supra, 398 N.J. Super. at 19. Neither the court nor the commentator cites any legal authority requiring a public hearing on the issue of distribution and the Commission is not aware of any such legal requirement.

The Commission also disagrees with the commentator's assertion that proposed rule N.J.A.C. 13:70-1.37 improperly precludes public participation in decision-making related to the distribution of CSSF monies. The commentator has not identified any legal authority that requires public participation in the distribution of CSSF monies to the racetracks and, if warranted, to the horsemen's organizations. As detailed above, the public has the right to receive notice of and attend any public meeting of the

Commission in which the CSSF monies will be distributed. The Commission is unaware of any legal authority which grants the public a right to participate in this decision-making. In fact, in *IMO CSSF*, the court specifically held that neither the NJTHA nor the other potential recipients of these monies have the right to a trial-type hearing. *IMO CSSF*, *supra*, 398 N.J. Super. at 17-18 ("[t]he competition between applicants authorized by N.J.S.A. 5:12-205d, is not a 'contested case' requiring a trial-like hearing pursuant to the APA.").

The Commission disagrees with the commentator's assertions that proposed rule N.J.A.C. 13:70-1.38 improperly "denies the right to a public hearing regarding the allocation of racing dates and denies all parties, except for the racetracks, the right to address the Commission or otherwise participate in the process." The Commission is not aware of any statutory or other legal requirement that requires it to hold a public hearing in connection with the annual allocation of race dates to the race tracks and the commentator has not identified any such authority. N.J.S.A. 5:5-43 requires the Commission to act upon all applications "at a meeting of the commission." At this meeting, "[a]ny applicant whose application ... may be present in person or by agent or counsel to be heard by the commission with respect to

such allotment or allotments at the meeting of the commission...."
N.J.S.A. 5:5-43. The proposed rule conforms to the statutory requirements.

The Commission disagrees with the commentator's assertion that proposed rule N.J.A.C. 13:70-1.38 is an illegal change from past practices in which the Commission allowed comment from the NJTHA and other organizations. The proposed rule is consistent with the applicable statutory mandates. Also, to the extent that persons or entities wish to comment on the applications for race dates, they may seek do so pursuant to the procedure set forth in proposed rule N.J.A.C. 13:70-1.35.

Finally, the Commission disagrees with the commentator's contention that the proposed rules codify past improper practices such as withholding information and documents from the public. The proposed rules set forth procedures consistent with law. The Commission rejects the commentator's suggestion that the Social Impact Statement should be revised to inform the public that the true intent, purpose and effect of the proposed rules is to restrict public access and participation in Commission activities and enhance the secrecy of the Commission's information.

COMMENT 3: The commentator argues that the Agriculture Impact Statement in the rule proposal erroneously

states that the rule proposals have no impact upon the State's agricultural industry. The commentator points out that horseracing is a billion-dollar agricultural industry and contends that the proposed rules impact this industry by curtailing the right of participation in Commission decisions. The commentator argues that the impact statement should "explain why the Commission proposes to shut out members and representatives of our State's billion-dollar horseracing industry from its decisional process."

RESPONSE: The proposed rules identify and inform the public of the procedures to be utilized by the Commission. The Commission disagrees with that the proposed rules will have a negative impact on the horseracing industry and with the commentator's assertion that the proposed rules are intended to shut out members and representatives of the horseracing industry.

COMMENT 4: The commentator argues that the Regulatory Flexibility Statement published in connection with the proposed rules is inaccurate. According to the commentator, the proposed rules will have a negative effect on small businesses, which include horse owners, breeders, farms, veterinarians and other members of the racing community, because the rules "severely restrict the right of small businesses to be heard by the Commission, and require them to make application to the Executive

Director for permission to be heard." The commentator argues that the Regulatory Flexibility Statement should be revised in conformance with applicable law to include "a candid description of the additional burdens placed upon small businesses in attempting to address the Commission and the reasons why those burdens are being proposed."

RESPONSE: The Commission disagrees with the commentator's statement that the proposed rules will have a negative effect on small businesses. The proposed rules identify and inform the public about the procedures to be utilized by the Commission. These procedures are consistent with the requirements of law and do not improperly restrict access to the Commission.

The Commission also notes that the commentator's suggested revisions are outside of the scope of the applicable law. Pursuant to N.J.S.A. 52:14B-19, a regulatory flexibility analysis is necessary only if the proposed rule would impose reporting, record-keeping and other compliance requirements on small businesses. Here, the proposed rules do not impose any such requirements. As a result, the Commission rejects the suggested changes advanced by the commentator.

COMMENT 5: The commentator contends that pursuant to N.J.S.A. 52:14B-3(2), the proposed rules must include all forms and

instructions used by the Commission.

RESPONSE: Proposed rule N.J.A.C. 13:70-1.38 is the only proposed rule which requires the use of a form. Pursuant to this rule, applications for race dates shall be made on the form prescribed by the Commission which shall be mailed to all permitted racetracks on or before October 1st of each year. The procedures set forth in the other proposed rules do not require the utilization of any particular forms or instructions. As a result, no forms or instructions are described therein

COMMENT 6: The commentator asserts that N.J.S.A. 52:14B-3(2) requires that the Commission's procedural rules include appeal procedures for decisions made by the Executive Director of the Commission. The commentator states that the proposed rules give the Executive Director authority to make certain decisions but do not identify a procedure to appeal the Executive Director's decision to the Commission. The commentator also states that the proposed rules do not provide for the entry of an appealable "order" or other expression of the Executive Director's decision. According to the commentator, the conferral of decisional power upon the Executive Director is improper. The commentator contends that if the Commission wishes to endow the Executive Director, or any other employee, with decisional authority, it must propose rules

that include appropriate mechanisms for an appeal of his decision to the Commission and for the expression of any decision in a form allowing an appeal to the courts.

RESPONSE: The Commission disagrees that the conferral of decision-making authority upon the Executive Director is contrary to law. Pursuant to N.J.S.A. 5:5-25, the Commission shall appoint an Executive Director "who shall be charged with the responsibility of administering all commission activities." As such, the Executive Director has extensive statutory authority to act on behalf of the Commission. In addition, the Commission has delegated specific authorities and responsibilities to the Executive Director by rule. For example, pursuant to N.J.A.C. 13:71-8.33, the Executive Director "shall be a representative at large of the Commission" and have the authority to supervise all race officials, licensees and employees as well as licensing, security provisions, the conduct of racing, pari-mutuel operations and testing. Pursuant to N.J.A.C. 13:71-1.1(c), the Executive Director "shall possess the same authority of the Racing Commission stewards and judges with respect to all provisions contained in the Administrative Code governing racing in New Jersey." See also N.J.A.C. 13:71-3.8 (authorizing the Executive Director to decide requests for stays pending appeal).

The commentator argues that the rules do not identify a procedure to appeal the decisions of the Executive Director to the Commission or provide for the entry of an appealable "order" or other expression of the Executive Director's decision. The Commission is of the opinion that the procedures set forth in the proposed rules are consistent with the requirements of law and disagrees that the suggested procedural rule is legally necessary. As set forth above, the Commission's rules provide that the Executive Director possesses the same authority of the stewards and judges with respect to all provisions contained in the Administrative Code. Pursuant to N.J.A.C. 13:70-1.16, any complaints involving a decision of the stewards or in this case, the Executive Director, may be made to the Commission in writing. The Commission may modify any such decision or penalty pursuant to N.J.A.C. 13:71-1.23. As a result, the Commission's rules already make provision for review and modification of decisions by the Executive Director. The Commission thanks the commentator for the suggestion of additional rules the Commission may wish to consider. The Commission disagrees with the commentator, however, to the extent that he asserts the proposed rules are legally defective.

COMMENT 7: The commentator states that the proposed rules include numerous instances in which the Executive Director,

a Commission employee, is empowered to make decisions. The commentator argues that only the Commission is given administrative authority by the Legislature, which established the membership of the Commission to ensure representation of a diversity of interests. The commentator points out that the Executive Director is an administrative employee of the Commission and not a member with the ability to vote. The commentator asserts that although N.J.S.A. 5:5-55 authorizes the Commission to refer a particular matter to the Executive Director to take testimony, no determination shall be made therein except by the commission. Citing *Mutschler v. New Jersey Dep't. of Env. Prot.*, 337 N.J. Super. 1, 12-13 (App. Div. 2001), certif. denied 168 N.J. 292 (2001); *Mercer Council No. 4, N.J. Civil Serv. Ass'n v. Allowa* [sic], 119 N.J. Super. 94, 99 (App. Div. 1972), aff'd o.b., 61 N.J. 516 (1972), the commentator argues that the powers and duties delegated to an administrative agency by the Legislature cannot be sub-delegated absent legislative intent that sub-delegation is intended.

The commentator asserts that the proposed rules grant the Executive Director vast discretionary authority to control the Commission's activities and the right of access to the Commission. In addition to the grant of authority to the Executive Director to discharge the Commission's statutory and regulatory functions set

forth in N.J.A.C. 13:70-1.33(a), the commentator references the authorization to allow the Executive Director to utilize his discretion to relax the application of the proposed procedural rules (N.J.A.C. 13:70-1.33(b)); to decide whether to place a matter on the Commission's meeting agenda (N.J.A.C. 13:70-1.33(c) and -1.36); to allow further written comment from interested parties (N.J.A.C. 13:70-1.35(b)); to determine whether a person or entity has a sufficient interest in, or possesses important information on, a matter before the Commission, which would warrant being heard (N.J.A.C. 13:70-1.35(d)) and to decide which issues are placed on the Commission's agenda (N.J.A.C. 13:70-1.36).

The commentator states that in many instances, the Executive Director's decisions are not subject to review by the Commission and that the proposed rules make no provision for informing the Commission of the Executive Director's decisions. The commentator also complains that the proposed rules do not require that the Executive Director's decisions must be set forth in an appealable order.

The commentator argues that this grant of decision-making authority to the Executive Director improperly thwarts statutory oversight of the Commission because the Executive Director's

decisions are not reflected in the Commission's minutes which, pursuant to N.J.S.A. 5:5-22.1, are reviewable by the Governor. The commentator concludes that the proposed rules elevate the Executive Director's decisions to a status above those of the Commission itself because his decisions are not reviewed. The commentator states that the proposed rules should not vest decisional authority in the Executive Director or other employees.

RESPONSE: The Commission agrees that the Executive Director is employed by the Commission and he does not have the right to vote on matters before the Commission. The commentator also correctly points out that N.J.S.A. 5:5-55 authorizes the Commission to refer a particular matter to the Executive Director to take testimony.

The Commission disagrees with the commentator's position that the Commission cannot legally delegate, or as referred to by the commentator, subdelegate powers, tasks and duties to the Executive Director or other employees. As discussed above in response to comment number 2, N.J.S.A. 5:5-25 statutorily charges the Executive Director with the responsibility of administering all commission activities. The case law cited by the commentator is inapposite. In *Mutschler v. New Jersey Dep't. of Env. Prot.*, supra, 337 N.J. Super. at 12-13, the court held that the grant of

legislative authority to the Department of Environmental Protection to administrate the CAFRA program cannot be delegated to municipal governments. In Mercer Council No. 4, N.J. Civil Serv. Ass'n v. Alloway, supra, 119 N.J. Super. at 96, the court held that the Civil Service Commission and its Chief Examiner and Secretary cannot legally assign statutorily delegated duties and functions to operating departments outside of Civil Service. Contrary to the commentator's assertion, these decisions do not prohibit, or even address, the delegation of responsibilities, tasks or duties within the agency itself.

The Commission also disagrees with the commentator's assertion that the delegation of authority set forth in the proposed rules he cites are contrary to N.J.S.A. 5:5-22.1 because decisions by the Executive Director are not reflected in the Commission's minutes which must be reviewed and approved by the Governor. N.J.S.A. 5:5-22.1 requires the Commission to transmit a true copy of the minutes of every Commission meeting to the Governor's Office which shall have the right of approval as set forth therein. Neither N.J.S.A. 5:5-22.1 nor any other statute requires that all actions related to the regulation of the horse racing industry, and the parimutuel wagering attendant upon it, be approved by the Governor. N.J.S.A. 5:5-22.1 requires Governor's

review only of those Commission actions and decisions that take place at a public meeting. By its specific terms, N.J.S.A. 5:5-22.1 "shall not apply to enforcement actions for violations of regulations promulgated by the commission."

COMMENT 8: The commentator points out that the proposed rules do not make any provision for the presentation of admissible evidence, as to any proceeding. Citing examples such as the distribution of CSSF monies, applications for race dates and other "information" provided to the Commission, the commentator argues that the proposed rules must provide for, and in various instances require, the submission of evidence under oath or in otherwise admissible form. The commentator contends that "[w]ithout admissible evidence, the Commission's decisions cannot be reviewed by the Courts under the 'residuum of evidence rule.'"

RESPONSE: The Commission disagrees with the commentator's interpretation of law. As set forth in the IMO CSSF decision, neither the NJTHA nor the other potential recipients of these monies have the right to a trial-type hearing. The court clearly stated that "[t]he competition between applicants authorized by N.J.S.A. 5:12-205d, is not a 'contested case' requiring a trial-like hearing pursuant to the APA. A proceeding qualifies as a 'contested case' only if there is a 'constitutional' or statutory

right to an agency hearing." IMO CSSF, supra, 398 N.J. Super. at 17-18. The court expressly held that "[a]llthough the racetracks and horsemen's organizations that meet the statutory standard for an award compete with each other for shares of this limited fund, we have held that one's position as a potential competitor is not a constitutionally protected 'property right' sufficient to require a trial-type hearing." Id. at 18.

Thus the Commission, and the appellate court itself, disagree with the commentator's contention that the proposed rules must make provision for the submission of evidence under oath or in otherwise admissible form. Pursuant to the dictates of the APA, the Commission transmits contested cases to the Office of Administrative Law ("OAL") for a de novo hearing. The OAL has promulgated comprehensive rule governing the conduct of these hearings, including the admission of evidence. See N.J.A.C. 1:1-1.1 to -21.6.

The Commission also disagrees with the commentator's contention that proposed rules must require admissible evidence or else "the Commission's decisions cannot be reviewed by the Courts under the 'residuum of evidence rule.'" Contrary to the commentator's assertion, the "residuum of evidence rule" does not apply to the proceedings of the Commission. Pursuant to N.J.A.C.

1:1-15.5(a), hearsay evidence shall be admissible at the OAL in the trial of contested cases. The "residuum of evidence rule" states that notwithstanding this admission of hearsay evidence, some legally-competent evidence must be entered into evidence at the OAL hearing to support sufficiently each ultimate finding of fact by the administrative law judge. N.J.A.C. 1:1-15.5(b). Thus, the "residuum of evidence rule" in no way applies to the public meetings of the Commission, at which CSSF monies are distributed or race dates are allocated, and it imposes no requirements on the record before the agency during such proceedings.

COMMENT 9: The commentator states that N.J.S.A. 52:14B-4(a)(3) requires the Commission to adopt a rule defining "sufficient public interest" in connection with the conduct of a public hearing and for the extension of time for public comment. According to the commentator, there is an ongoing dispute primarily between the NJTHA and the Commission as to whether a definition of this term applies to the Commission. The commentator asserts that the Commission should resolve this alleged dispute, put an end to any uncertainty and avoid further litigation on this issue by proposing a rule defining "sufficient public interest."

The commentator recognizes the applicability of N.J.A.C. 13:1E-4.2(b) and -4.3 to the Commission and the fact that these

rules, which were promulgated by the Department of Law and Public Safety, apply to all Divisions within the Department including the Commission. Correctly pointing out that N.J.A.C. 13:1E-4.3(b) requires at least 50 written requests for a public hearing, the commentator asserts that this rule places further restrictions upon the content of the written requests. According to the commentator, such high thresholds are inappropriate and arbitrary for the Commission, which regulates a numerically modest and well-defined community of licensees and less than a handful of racetracks. The commentator states that the Commission publishes a small number of rule proposals annually and these proposals as well as the Commission's proceedings are of great interest to the racing community. According to the commentator, these proposals and proceedings "often generate heated controversy and litigation." The commentator expresses his opinion that the Commission has a record of ignoring the racing community. The commentator asserts that the Commission should propose rules defining "sufficient public interest" in a manner that recognizes the nature and number of the racing community, to facilitate -- not restrict -- open government.

The commentator suggests that "the Commission's apparent intention to use N.J.A.C. 13:1E-4.3(b) as its standard of sufficient public interest also contradicts its proposals to

severely (and improperly) limit access to the Commission." Referencing comments he numbered as 16 and 17, the commentator states that "[o]n the one hand, the Commission seeks to prevent all but a handful of parties from addressing the Commission. On the other hand, the Commission apparently wishes to use the '50 written requests' criterion of the Department of Law and Public Safety, which does not restrict access to the administrative process." The commentator concludes that "[t]he combination of these rule proposals with reliance upon N.J.A.C. 13:1 E-4.3(b) may be used as a pretext for denying a public hearing in virtually all matters."

The commentator states that the Commission's reliance upon N.J.A.C. 13:1E-4.3(b) to define "sufficient public interest" contradicts the statutory, recognized function of the NJTHA and other industry associations. According to the commentator, the NJTHA is the recognized association representing thoroughbred owners, trainers and other personnel employed in the industry in this State. In support of this contention, the commentator cites statutory provisions including those in N.J.S.A. 5:5-23, -66, -98, -126, -153 as well as N.J.S.A. 5:10-7, N.J.S.A. 5:12-198 and N.J.S.A. 5:12-204. Recognizing the provision in N.J.A.C. 13:1E-4.3(c) which clearly states that "[f]or the purposes of (b)1 above,

a professional organization or law firm that submits a request for a public hearing on behalf of a group of interested parties shall be considered one person," the commentator contends that this rule, which defeats the statutory role of the NJTHA and other racing community organizations, is plainly inappropriate.

RESPONSE: Rules defining "sufficient public interest" for the purpose of extending the comment period and considering requests for a public hearing are set forth at N.J.A.C. 1:13E-4.2 and N.J.A.C. 1:13E-4.3. The Division of the New Jersey Racing Commission is constituted within the Department of Law and Public Safety. N.J.A.C. 13:1E-1.2(g). In rulemaking, the Commission complies with these rules. See N.J.A.C. 13:1E-4.1 (This subchapter applies to all rules proposed under the authority of a division in the Department of Law and Public Safety that is subject to the supervision of the Attorney General.). These rules and the requirements set forth therein are consistent with all requirements of law.

The Commission disagrees with the commentator's view that there is an ongoing dispute and uncertainty over whether the Department's rules defining "sufficient public interest" applies to the Commission. Because the Commission is a division within the Department, these rules apply. Any challenge to these existing rules, duly promulgated by the Department, cannot be legitimately

pursued with comments to the Commission's proposed procedural rules.

The Commission disagrees with the commentator's statement the requirement of 50 written requests for a public hearing set forth in N.J.A.C. 13:1E-4.3(b) establishes high thresholds that are inappropriate and arbitrary for a numerically modest community of licensees and less than a handful of racetracks. The Commission does not agree that the requirement of 50 written requests is too large a number for the racing industry. Contrary to the commentator's depiction of the horseracing industry in this State as "a numerically modest community of licensees," the number of licensees in this State are vast. As set forth in its 2007 Annual Report, the Commission issued a total of 6,196 licenses in connection with the thoroughbred industry and 8,412 licenses in connection with the standardbred industry in this State in 2007. As a result, the Commission does not agree that the requirement that 50 written requests is too high a number to be borne by this industry. The Commission also disagrees with the commentator's assertion that requiring 50 written requests is a pretext for denying a public hearing in virtually all matters.

The Commission does not agree with the commentator's view that the definition of "sufficient public interest" illegally

contradicts or limits the statutory, recognized function of the NJTHA and other industry associations. Pursuant to N.J.A.C. 13:1E-4.3(c), a professional organization that submits a request for a public hearing on behalf of a group of interested parties shall be considered one person. This rule applies uniformly to all professional organizations that fall within the ambit of the departmental rules and not just the NJTHA. The Commission also disagrees with the commentator's position that this rule requirement inappropriately defeats the statutory role of the NJTHA and other racing community organizations. Although a written request by the NJTHA for a public hearing shall be counted as one request, any of the thousands of industry licensees may also request a hearing. As a result, the Commission disagrees that this provision of N.J.A.C. 13:1E-4.3(c), a duly-adopted rule that is not part of the current rule proposal, is inappropriate.

COMMENT 10: The commentator states that the Commission should propose a procedural rule prohibiting the consideration of Casino Fund distributions, racing dates, and other matters in closed session.

RESPONSE: The Commission does not agree with the commentator's position that the commission should promulgate a rule prohibiting the consideration of Casino Fund distributions, racing

dates, and other matters in closed session. Discussions in closed session are regulated by the OPMA, N.J.S.A. 10:4-6 et seq. The Commission does not agree that a procedural rule setting forth the mandates of the Act is necessary or warranted.

COMMENT 11: The commentator asserts that consistent with N.J.S.A. 5:5-22.1, the Commission should propose a procedural rule governing the transmittal of the minutes of every Commission meeting to the Governor for review and action in accordance with the statute.

RESPONSE: The Commission does not agree that the currently-proposed procedural rules must address the transmittal of minutes pursuant to N.J.S.A. 5:5-22.1. or that such a rule is necessary. The required procedure for providing the Commission's minutes to the Governor is explicitly mandated in detail in N.J.S.A. 5:5-22.1. Pursuant to this statute, the Executive Director shall deliver a true and certified copy of the minutes of every Commission meeting to the Governor. No action of the Commission taken at a meeting shall have force and effect until 10 days (exclusive of Saturdays, Sundays and holidays) after the minutes have been delivered or the Governor approves the minutes, whichever occurs first. Any action of the Commission shall be null and void if the Governor vetoes the action and returns the minutes

to the agency within the 10-day review period. During this period of time, the Governor may approve all or part of an action taken at such meeting. The Governor's right of review granted by the statute does not extend to enforcement actions for violations of the Commission's regulations.

All aspects of the delivery of Commission minutes to the Governor as well as the provisions for his review, approval or veto, are detailed in N.J.S.A. 5:5-22.1. The Commission does not believe that an interpretive rule is necessary or warranted as the statutory procedure cannot be modified.

COMMENT 12: The commentator states that the proposed procedural rules do not address the release of minutes of closed sessions. The commentator asserts that N.J.S.A. 10:4-13(b) requires the Commission to specify the time and circumstances under which discussions in closed session and minutes can be disclosed to the public. The commentator states, upon information and belief, that the Commission has never done so, nor has the Commission ever released any minutes of its closed sessions. The commentator recommends that the Commission propose a rule prescribing procedures for the specification of the time and circumstances under which minutes of closed sessions will be released, including the

release of minutes of closed sessions held prior to the adoption of it's the procedural rule he proposes.

RESPONSE: The Commission disagrees with the commentator's assertion that the Commission has never produced copies of the minutes of its executive session. The Commission believes that the disclosure of executive minutes is sufficiently addressed in the OPMA and a procedural rule is not necessary.

COMMENT 13: The commentator states that proposed rule N.J.A.C. 13:70-1.33(a) erroneously indicates that the Executive Director discharges the "statutory and regulatory functions" of the Commission. He asserts that the reference to the Executive Director should be stricken.

RESPONSE: The Commission does not agree with the commentator's assertion of error. The rule is correct as written.

COMMENT 14: The commentator states that contrary to N.J.A.C. 13:70-1.33(b), the Executive Director cannot be empowered to waive rules of procedure, whether in his "discretion" or otherwise. The commentator asserts that a proposal allowing the Commission to relax the rules upon the request of a party, subject to Commission consideration and vote on the record, may be acceptable. The commentator references his comments on the

"statutory right to participate" as well as his comments on proposed rule N.J.A.C. 13:70-1.39.

RESPONSE: The Commission disagrees with the commentator's assertion, which is advanced without any legal support. The Commission believes that proposed rule N.J.A.C. 13:70-1.33 constitutes a proper delegation of authority to the Executive Director and is unaware of any legal authority that would prohibit it.

COMMENT 15: The commentator states that proposed rule N.J.A.C. 13:70-1.33(c) improperly allows the Executive Director to control access to the Commission. According to the commentator, no statutory nor other basis exists for endowing the Executive Director, a Commission employee, with the power to decide which matters and parties the Commission will hear. The commentator contends that this impropriety is exacerbated by the fact that the Executive Director does not act on the record and, therefore, his actions would be insulated from statutory or judicial review. The commentator asserts that his review of the New Jersey Administrative Code disclosed no administrative employee in any agency who has this authority. The commentator concludes that N.J.A.C. 13:70-1.33(c) should be stricken and the Commission itself should decide what it will hear, on the record and in a manner

consistent with due process, gubernatorial review, and other applicable law.

RESPONSE: The Commission disagrees with the commentator's position that the delegation of authority in proposed rule N.J.A.C. 13:70-1.33(c) to the Executive Director is unlawful or improper. It is well-established that an agency's choice of procedures is entitled to substantial deference. The Commission is unaware of any legal authority which prohibits the delegation of authority in N.J.A.C. 13:70-1.33(c) and the commentator has cited none.

COMMENT 16: The commentator states that proposed rule N.J.A.C. 13:70-1.34 imposes an improper restriction upon access to Commission. The commentator notes his confusion over the fact that the proposed rule purports to deal with "notice of proceedings." According to the commentator, the rule improperly restricts the right of access to the Commission because it limits "interested parties" to only those "that are both (1) identified by statute and also (2) "given the express authority to submit applications, comments or other information to the Commission." The commentator states that the statutes governing Commission activities do not restrict the right of access to the Commission which is, in effect, shutting its doors to the public. The commentator indicates that

his review of the New Jersey Administrative Code disclosed no similar rule by any other agency. The commentator concludes that the proposed rule should be stricken. According to the commentator, if the Commission wishes to provide notice of its agenda, in addition to that already provided, then its procedural rules should allow any member of the public to request a copy of the Commission's agenda.

RESPONSE: The Commission disagrees with the commentator's assertion that proposed rule N.J.A.C. 13:70-1.34 improperly restricts the right of access to the Commission, an argument the commentator also makes in Comment 2. The proposed rule makes provision for notice of Commission proceedings to "interested parties" as defined therein. This notice is in addition to the notice required by the OPMA. The Commission hereby incorporates its responses to the comments set forth including its response to Comment 2.

COMMENT 17: The commentator asserts that proposed rule N.J.A.C. 13:70-1.35, which improperly restricts the right to address the Commission, violates the right to due process. According to the commentator the proposed rule's applicability to "interested parties" is improper and will generate endless

litigation over whether a horse owner, trainer, organization, member of the public, or otherwise is an "interested person." The commentator argues that the Commission is charged with considering the welfare of the racing industry as a whole, as well as the public interest, and it cannot deny any party the right to address the Commission.

According to the commentator, proposed N.J.A.C. 13:70-1.35 would violate basic rights of administrative due process, petitions to government, and the fundamental concept of open government. The commentator asserts that the Commission's rules of procedure should allow all parties to address the Commission, provide for the disclosure of all written submissions (by parties, Commission staff and otherwise) in a timely manner, and allow all parties to respond in writing and in person before the Commission.

The commentator asserts that proposed rule N.J.A.C. 13:70-1.35(a) unduly restricts the submission of "information" to the 15- day period that begins with the issuance of "notice" pursuant to proposed rule N.J.A.C. 13:70-1.34. According to the commentator, this section of proposed rule N.J.A.C. 13:70-1.35(a) is improper because the Commission could ignore any material submitted prior to "notice." The commentator also asserts that proposed subsection (a) does not specify the form of "information."

The commentator asserts that proposed rule N.J.A.C. 13:70-1.35(b) "is limited to the dissemination of 'information received from interested parties.'" The commentator argues that the Commission's use of undisclosed documents and information from staff is improper. According to the commentator, the proposed rule would perpetuate this improper practice by withholding all documents and information except that submitted by "interested parties." The commentator also argues that proposed rule N.J.A.C. 13:70-1.35(b) constitutes an "egregious denial of fundamental due process, because it subjects the right of response to the 'discretion' of the Executive Director." The commentator states that the right to comment upon and respond to information and evidence is a right -- not a matter of "discretion." The commentator concludes that the rule improperly vests power in the Executive Director to determine if further written comment from "interested parties" is needed after all submissions by these "interested parties" have been circulated among them.

The commentator states that proposed rule N.J.A.C. 13:70-1.35(d) improperly abridges the right to respond and address the Commission, by rendering it a mere matter of "discretion" on the part of the Commission.

The commentator argues that proposed rule N.J.A.C. 13:70-1.35(e) improperly abridges the right to address the Commission by prohibiting written submissions. The commentator states that N.J.A.C. 13:70-1.35(e) allowance of only verbal comments is conditioned as to whether the Executive Director, in his "discretion," allows the party to speak.

RESPONSE: The Commission disagrees with the commentator's position that proposed rule N.J.A.C. 13:70-1.35 is contrary to law, an argument the commentator also makes in Comment 2. The Commission does not agree that the proposed rule's applicability to "interested parties" is improper or will generate endless litigation over whether a horse owner, trainer, organization, member of the public, or otherwise is an "interested person." The term "interest parties" is clearly defined in proposed rule N.J.A.C. 13:70-1.34 to mean "those persons or entities that are identified by statute and given the express authority to submit applications, comments or other information to the Commission for its consideration before or when reaching a decision at a scheduled meeting." The Commission believes that this definition clearly identifies "interested parties."

The Commission also disagrees with the commentator's position that proposed rule N.J.A.C. 13:70-1.35(a) improperly

limits the time period for the submission of information by "interested parties." The intent of the rule is to provide notice of the procedure and schedule the Commission will follow and not to restrict the time-period for the submission of information. The proposed rule does not limit or dictate the information which "interested parties" may submit to the Commission. The Commission leaves the determination of what information should be submitted to each "interested party" to decide.

The Commission does not accept the commentator's view that proposed rule N.J.A.C. 13:70-1.35(b) requires or would result in the Commission withholding all information before it from the public except for the submissions of "interested parties." N.J.A.C. 13:70-1.35(b) establishes a procedure allowing for the submission of information to the Commission by "interested parties." This subsection in no way restricts information which must be made available to the public pursuant to the provisions of the OPMA or OPRA.

The Commission also does not agree that proposed rule N.J.A.C. 13:70-1.35(b) denies the fundamental due process rights of "interested parties" because the ability to make further written comment is limited to the discretion of the Executive Director. The proposed rule sets forth the procedure for notifying

"interested parties" of the schedule for submission to the Commission of applications, comments or other information allowed by statute. The proposed rule makes provision for the circulation of the submitted comments among the "interested parties" and for requests to submit further written comments. In addition, N.J.A.C. 13:70-1.35(d) establishes a procedure allowing "interested parties" to request to be heard verbally before the Commission at the scheduled public meeting.

The Commission disagrees with the commentator's assertions that granting the Executive Director the discretion to allow for further written comment violates due process. Should any "interested party" believe that further comment is warranted or needed, it may ask the Commission to be heard verbally at the scheduled meeting.

Similarly, the Commission does not agree with the commentator's argument that N.J.A.C. 13:70-1.35(d) violates the due process rights of "interested parties" because the decision whether to grant requests to make verbal comments at the scheduled meeting lies within the Commission's discretion. The Commission believes that the provisions of N.J.A.C. 13:70-1.35, which require the notification of "interested parties" that they may submit information on the identified issue for the consideration of the

Commission, the circulation of the submitted information among all "interested parties" and the ability to comment further, if the Commission believes it would be necessary, warranted or helpful, are consistent with the requirements of law.

Finally, as set forth at length in the Commission's response to Comment 2, the Commission disagrees with the commentator's assertion that N.J.A.C. 13:70-1.35(e) violates the public's right to due process because the rule does not make provision allowing any person who wishes to do so to address the Commission. The OPMA requires the Commission to provide adequate notice of a scheduled meeting to the public. Adequate notice is defined to mean "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda...." N.J.S.A. 10:4-8(d). The OPMA gives the public the right to have advance notice of a public body's meetings and the right to attend these meetings. The OPMA does not grant the public a right to participate in the meeting. N.J.S.A. 10:4-12 clearly states that "[n]othing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting...."

COMMENT 18: The commentator states that proposed rule N.J.A.C. 13:70-1.36 establishes improper control of the

Commission's agenda. According to the commentator, the proposed rule grants the Executive Director absolute, unreviewable discretion to control the Commission's agenda, without any standards for decision. The commentator asserts that the provision in the proposed rule which allows any person or entity with an identifiable interest in horse racing, or the parimutuel wagering attendant upon it, to request in writing that a specified issue be placed before the Commission "is illusory and improper, since the Commission's duties include the public interest generally." According to the commentator, the proposed rule should be stricken and replaced by a provision allowing the Commission to determine its own agenda, on the record, without limitation as to whom may request Commission consideration.

RESPONSE: The Commission disagrees with the commentator's assertion that the procedure for requesting that an issue be placed on the Commission's agenda set forth in proposed rule N.J.A.C. 13:70-1.36 is improper. The proposed rule complies with all requirements of law and constitutes a legitimate exercise of the Commission's administrative authority. The Commission does not agree with the commentator's assertion, made without citation to any applicable legal authority, that the Commission cannot legally delegate authority to the Executive Director to compile the

Commission's meeting agenda, a responsibility that the Executive Director has borne for decades. In addition, to the extent that the commentator reiterates his prior comments, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comment 2, 7, 15 and 16.

COMMENT 19: The commentator states that proposed rule N.J.A.C. 13:70-1.37 fails to "implement" the IMO CSSF decision. Citing subsection (a), the commentator states that the proposed rule expressly denies the right to a public hearing. According to the commentator the court did not hold that a public hearing was not required. The commentator also argues that proposed rule N.J.A.C. 13:70-1.37(a) "codifies" the procedure previously followed by the Commission in distributing CSSF monies and that the court expressly held that those procedures to be improper.

The commentator asserts that N.J.A.C. 13:70-1.37(b) improperly limits the right to address the Commission, thus denying members of the racing community and the public the right to participate. The commentator also argues that the definition of "interested parties" contradicts N.J.S.A. 5:12-205(d) which name's racetracks and horsemen's organizations as potential recipients of CSSF monies. According to the commentator, the definition of "interested parties" in N.J.A.C. 13:70-1.37(b) "flatly contradicts

the proposal's (erroneous) reliance upon 'statutory definitions' of 'interested parties' reflected in proposed N.J.A.C., 13:70-1.34 and elsewhere." The commentator argues that "[t]here are no 'statutory definitions' of which parties can address the Commission; hence, the Commission's (improper) attempt to define the concept here."

The commentator states that proposed rule N.J.A.C. 13:70-1.37(c) fails to provide for the consequences of a racetrack's failure to submit the indicated information. The commentator also points out that this subsection does not require the racetracks to describe the manner in which the requested funds would be used as the rule does for horsemen's organizations in subsection (d). The commentator argues that the rule should treat all applicants fairly and equally.

The commentator states that proposed N.J.A.C. 13:70-1.37(e) contradicts N.J.S.A. 5:12-205 because the proposed rule provides that the CSSF monies to be disbursed lie within the Commission's discretion. The commentator argues that the proposed rule is inconsistent with N.J.S.A. 5:12-205 which requires that the CSSF monies shall be annually disbursed in their entirety.

The commentator argues that N.J.A.C. 13:70-1.37(f) impairs the jurisdiction of the courts and contradicts the New Jersey Court Rules by prohibiting a stay of the ordered

distribution or the placement of the CSSF monies in escrow. According to the commentator the proposed rule contradicts R. 2:9-7 which requires that an application for a stay of administrative action be made, in the first instance, to the agency whose order is being appealed. The commentator argues that N.J.A.C. 13:70-1.37(f) contravenes the court rule because "judicial procedure contemplates a reasoned and case-specific decision by the administrative agency -- not a blanket 'no' imposed by regulation." According to the commentator, the Commission cannot deny interim remedies such as a stay globally and arbitrarily without regard to the facts and circumstances of each case.

The commentator asserts that N.J.A.C. 13:70-1.37(f) purports to limit the courts' ability to direct a refund of illegally-distributed funds. The commentator criticizes the Commission for making the recipients of supposed wrongful distributions wait until the next annual disbursement to receive a refund of the alleged proper amount.

The commentator asserts that N.J.A.C. 13:70-1.37(g) purports to empower the Commission to require the return of monies if they are "misused" or the recipient is "unable to account" for the funds. The commentator views the proposed rule as unworkable, because there is no provision for an accounting and the concept of

"misuse" is not defined. The commentator also takes the position that the proposed rule is fundamentally discriminatory, because it would apply only to horsemen's organizations and not to tracks since the latter are allowed to obtain funds without specifying the purposes for which the funds are used.

The commentator argues that the proposed rule should be withdrawn and a new proposal framed after consultation with the past and potential CSSF applicants and others. The commentator states that the NJTHA has submitted proposals for a CSSF distribution rule, which the Commission has disregarded. Finally, the commentator references his Comment 24.

RESPONSE: The Commission does not agree with the commentator's assertion that a right to a public hearing exists in connection with the distribution of CSSF monies. Neither the court's decision in IMO CSSF nor any other legal authority known to the Commission requires that a public hearing be held and the commentator has not cited any authority for his contention. The Commission also disagrees with the commentator's assertion that proposed rule N.J.A.C. 13:70-1.37(b) codifies a procedure that was struck down by the court in IMO CSSF. It is the Commission's position that the procedure established by this rule complies with all requirements of law.

The Commission disagrees that N.J.A.C. 13:70-1.37(b) improperly limits the right to address the Commission and denies members of the racing community and the public the right to participate. As set forth at length in the Commission's responses to Comment 2, 3, 8, 16 and 17, which are hereby incorporated by reference, the Commission does not agree with the commentator's assertion that N.J.A.C. 13:70-1.37(b) improperly denies the racing community and public the right to address the Commission and the right to participate.

The Commission also disagrees with the commentator's contention that the definition of "interested parties" for the purposes of N.J.A.C. 13:70-1.37(b) contradicts N.J.S.A. 5:12-205(d). As defined in the proposed rule, the term "interested parties" for the purpose of the distribution of CSSF monies includes the permitted racetrack as well as the horsemen's organization[s] who represent a majority of the owners, breeders and trainers of each breed of race horses. The Commission does not agree that this definition is contrary to N.J.S.A. 5:12-205(d).

The Commission does not agree that the proposed rule must address a racetrack's failure to submit information to the Commission in connection with the distribution of CSSF monies. Obviously, the Commission will not consider any information not

submitted by a potential recipient of CSSF monies. The Commission disagrees with the commentator's contention that proposed rule N.J.A.C. 13:70-1.37(c) should require the racetracks to describe how they would use the requested funds. N.J.S.A. 5:12-205(d) mandates that before monies can be distributed to a horsemen's organization, that organization must inform the Commission how it will "use the money to fund a project which the commission determines will be beneficial to the racing industry." There is no statutory requirement that racetracks explain how the monies distributed to them will be used.

The Commission does not agree with the commentator's assertion that N.J.A.C. 13:70-1.37(e) is contrary to N.J.S.A. 5:12-205. N.J.A.C. 13:70-1.37(e) states that "[t]he amount of CSSF monies to be disbursed, pursuant to N.J.S.A. 5:12-205d, to permitted New Jersey racetracks and the horsemen's organizations shall lie within the Commission's discretion and be in such amounts as the Commission deems appropriate." The commentator is correct that N.J.S.A. 5:12-205 requires that these monies must be disbursed annually in their entirety. The Commission disagrees, however, with the commentator's assertion that N.J.A.C. 13:70-1.37(e) contravenes the statute. The rule provides that in the Commission's annual disbursement of CSSF monies in their entirety,

the particular amounts disbursed to each designated recipient shall lie within the Commission's discretion. N.J.A.C. 13:70-1.37(e) is consistent with the decision in IMO CSSF, in which the court explained that the statute "gives the NJRC broad discretion to exercise its expertise in distributing the surplus in the Special Fund in accordance with the assessment of the impact of casino simulcasting on the racetracks, the financial condition of the racetracks and projects that will be 'beneficial to the racing industry.'" IMO CSSF, supra, 398 N.J. Super. at 16. The court also pointed out that the questions the NJRC must address in making the annual distribution do not require rulemaking as the Legislature has charged the NJRC with deciding the annual distribution of these monies in light of the amount available and the quality of the applications received. Id. at 17. Proposed rule N.J.A.C. 13:70-1.37(e) is therefore entirely consistent with law.

The Commission disagrees with the commentator's contention that N.J.A.C. 13:70-1.37(f) contravenes R. 2:9-7. In proposing N.J.A.C. 13:70-1.37, the Commission set forth in the Summary that consistent with current law, "the Commission's Order of Disbursement of CSSF monies shall constitute a final decision of the agency and any appeal of such Order shall be made to the

Appellate Division of the Superior Court of New Jersey upon notice to the Commission and all other recipients of CSSF monies." After careful consideration of the financial needs of the recipients and the annual availability of CSSF distributions, the Commission explained in the Summary that "the Commission will not grant any request to stay or escrow the amounts disbursed pending appeal because of the recipients' need to rely upon timely receipt of the monies disbursed and the statute's requirement of annual distributions." In reaching this decision to provide by rule that it will not grant a stay, the Commission carefully considered and weighed the equities and interests involved. Its decision to do so is neither inconsistent with nor contrary to law.

The Commission disagrees with the commentator's position that N.J.A.C. 13:70-1.37(f) wrongfully requires that any adjustment of amounts disbursed shall be made in the next annual distribution of CSSF monies. The proposed rule is consistent with the Commission's actions in connection with past appeals of CSSF distributions. In these appeals, the Commission did not stay the distribution CSSF monies. Past appeals have also shown that the appeal process for challenges to CSSF distributions takes a minimum of several months before they contested issues are resolved. The Commission does not view the proposed requirement of remedying any

changes in disbursement at the next annual disbursement of CSSF monies to be unduly burdensome. As set forth above, good cause exists for the provision in the proposed rule for not granting a stay "because of the recipients' need to rely upon timely receipt of the monies disbursed."

The Commission disagrees with the commentator's assertion that proposed rule N.J.A.C. 13:70-1.37(g) is unclear or unworkable because the rule makes no provision for an accounting and the concept of "misuse" is undefined. The Commission believes that the circumstances under which a CSSF recipient may be ordered to return any or all CSSF monies are adequately set forth in the proposed rule. The rule clearly states that return may be ordered if information comes to the attention of the Commission that the recipient is not using the monies for the purposes or projects intended or information comes to the attention of the Commission that the recipient is otherwise misusing or unable to account for such monies.

The Commission also disagrees with the commentator's position that the proposed rule is fundamentally discriminatory because it would apply only to horsemen's organizations and not to tracks since the latter are allowed to obtain funds without specifying the purposes for which the funds are used. The proposed

rule is consistent with N.J.S.A. 5:12-205 which requires horsemen's organizations, but not racetracks, to detail how they will use the monies to fund a project that will be beneficial to the racing industry in New Jersey. The Commission does not agree that the proposed rule, which is consistent with the mandates of the statute, is in any way discriminatory to horsemen's organizations seeking a disbursement of CSSF monies. The Commission also does not agree that proposed rule N.J.A.C. 13:70-1.37 should be withdrawn. The rule sets forth a procedure consistent with law and fair to all who apply for CSSF monies. Finally, the Commission also incorporates its response to Comment 2.

COMMENT 20: The commentator states that proposed rule N.J.A.C. 13:70-1.38(a) wrongfully denies a public hearing in connection with the allocation of race dates and N.J.A.C. 13:70-1.38(b) constitutes "a clear and egregious denial of the right of the horsemen's organizations and the public to participate in the allocation process." The commentator argues that the allocation of race dates is vital to the livelihood of thousands of jockeys, trainers, backstretch workers, horse farmers and others and fraught with the public interest as well. The commentator states that in this proposed rule, the Commission proposes to close its doors to everyone except the race tracks.

The commentator reiterates these arguments in connection with subsection (f) of the proposed rules and argues that the procedure in the rule constitutes an improper denial of due process and a major change from prior years.

According to the commentator, although subsection (g) of the proposed rule purports to "giv[e] due consideration to ... the interests of ... the public," the only party permitted to address the Commission are the racetracks.

The commentator references subsection (h) of the proposed rule which recognizes enhanced employment, recreational opportunities, the competitive position of New Jersey and the like to be components of the "public interest." The commentator argues that the proposed rule improperly excludes those whose jobs are at stake, those who would use recreational opportunities and the public from addressing the Commission.

The commentator alleges that the Commission knows that the Atlantic City Race Course is controlled by the same interests that are heavily invested in racing in Pennsylvania. According to the commentator, the Commission only "pays lip service to New Jersey's competitive position vis-a-vis Pennsylvania, but shuts its doors to the New Jersey racing community."

The commentator indicates that the Commission's allocation of race dates for 2008 are the subject of a pending appeal. The commentator criticizes the Commission for not mentioning this appeal in the Summary and argues that the Commission should await the outcome before proposing a rule on this topic.

The commentator concludes that the Commission should withdraw the proposed rule and frame a new rule after consultation with members and representatives of the racing community, the tracks, and others. The commentator also references his Comment 24.

RESPONSE: The Commission disagrees with the commentator's assertion that proposed rule N.J.A.C. 13:70-1.38(a) wrongfully denies a public hearing in connection with the allocation of race dates and N.J.A.C. 13:70-1.38(b) constitutes "a clear and egregious denial of the right of the horsemen's organizations and the public to participate in the allocation process." The Commission is unaware of any legal authority requiring it to hold a public hearing in connection with the allocation of race dates and the commentator has cited none. N.J.S.A. 5:5-43 clearly states that the Commission shall act on applications for race dates "at a meeting of the commission." The Commission also disagrees that proposed subsection (b) constitutes an egregious denial of the right of the horsemen's organizations and the public to participate in the allocation

process. The procedure set forth in N.J.A.C. 13:70-1.38 is consistent with the requirements of N.J.S.A. 5:5-43. To the extent that horsemen or other members of the public wish to be heard on the issue of the allocation of race dates, they may request the opportunity to be heard pursuant to proposed rule N.J.A.C. 13:70-1.35(e) which states that "[a]ny person or entity who has not been designated as an interested party by the Commission and does not have a statutory right to be heard on a specific matter before the Commission in accordance with N.J.A.C. 13:70-1.34, may, at least 14 days prior to the meeting upon which the specific matter is scheduled, request in writing the opportunity to be heard at the meeting." As a result the Commission disagrees with the commentator's position that the proposed rule constitutes an improper denial of due process.

The Commission also disagrees with the commentator's assertion that proposed rule contradicts the Commission's statement in the Summary which indicates that the proposed rule "codifies the procedures currently followed by the Commission in the annual allocation of race dates." The terms of the proposed rule are clear and speak for themselves. The Commission disagrees that the Summary improperly creates confusion.

The commentator correctly references subsection (h) of the proposed rule which sets forth considerations related to the "public interest" in racing. The proposed rule indicates that the Commission will consider the revenues from racing to the State, its agencies and subdivisions, the continuity of racing and year-round racing so as to promote the racing industry and maintain and enhance the employment which it provides in this State, the provision of recreational opportunities for residents in the several areas of the State where licensed tracks are situated, and the maintenance and improvement of the State's competitive position with regard to neighboring racing states.

The commentator is correct that the Commission is aware of ownership interests in the racetracks. The Commission disagrees that this knowledge has a negative impact upon its consideration of the "public interest" within this State.

The Commission disagrees that it should have stated in its rule proposal that the allocation of race dates for 2008 is under appeal. There is no legal authority in the APA or elsewhere that requires an agency to list or describe matters under appeal in a rule proposal. The Commission disagrees with the commentator's assertion that the Commission should have awaited the outcome of this appeal before proposing N.J.A.C. 13:70-1.38. The proposed

rule conforms to the APA and establishes a procedure for the allocation for race dates that is consistent with law. As a result, the commission does not agree with the commentators position that the proposed rule should be withdrawn. The Commission also incorporates by reference its responses to the comments set forth above including hereby its responses to Comments 2, 8, 16, 17, and 24.

COMMENT 21: The commentator states that proposed rule N.J.A.C. 13:70-1.33(b) empowers the Executive Director with discretion to "relax" rules N.J.A.C. 13:70-1.33 through -1.41. According to the commentator, proposed N.J.A.C. 13:70-1.39 contradicts N.J.A.C. 13:70-1.33(b) by prescribing a procedure for a waiver application to the Commission without any role for the Executive Director. Because of this perceived contradiction, the commentator interprets N.J.A.C. 13:70-1.33(b) as allowing the Executive Director to act sua sponte, without any request from any party, to ignore the rules. The commentator states that an action by the Commission, on the record, is preferable to the utilization of discretionary authority afforded to the Executive Director.

The commentator asserts that proposed rule N.J.A.C. 13:70-1.39 should be revised to require the party requesting a waiver to

provide copies of the request to all persons or entities who might be affected as well as to the Commission. The commentator states that the rule should allow any party, whether or not the requestor notified them, to respond and address the requested waiver at the Commission's public meeting. The commentator concludes that the proposed revisions will render proposed N.J.A.C. 13:70-1.33(b) superfluous.

RESPONSE: The Commission disagrees with the commentator's perception that proposed N.J.A.C. 13:70-1.39 contradicts N.J.A.C. 13:70-1.33(b). N.J.A.C. 13:70-1.33(b) authorizes the Executive Director to relax the commission's rules of practices and procedures set forth at N.J.A.C. 13:70-1.32 thorough N.J.A.C. 13:70-1.41 upon notice to all parties given the statutory right to participate in a proceeding before the Commission by N.J.S.A. 5:5-22 through -160 or 5:12-191 through 210. In contrast, N.J.A.C. 13:70-1.39 establishes a procedure whereby any person or entity desiring a waiver or release from the express provisions of any of the Commission's rules set for in Chapter 70, 71, 72 and 74 of Title 13. As a result, the Commission disagrees with the commentator's position that these rules are contradictory or authorize an improper disregard of the Commission's procedural rules. The Commission also notes that the proposed rule requires

any person or entity seeking a waiver or release from the Commission's rules to identify all persons or entities who might be affected if the relief were granted and detail all facts that support the necessity of the requested relief. Subsection (d) of the proposed rule requires that any decision on a request for a waiver pursuant to N.J.A.C. 13:70-1.39 shall be addressed by the Commission at a public meeting. As a result, the Commission believes the procedure set forth in the rule is consistent with law as written.

COMMENT 22. The commentator states that proposed rule N.J.A.C. 13:70-1.41 is unclear because subsection (a) appears to apply only to matters such as disciplinary proceedings which may become contested cases. The commentator asserts that subsection (a) subsection contradicts subsection (b) because (a) limits representation to attorneys admitted to practice in New Jersey. The commentator states that the provision for admission pro hac vice in subsection (b) should be added to subsection (a).

The commentator argues that subsection (b) of the proposed rule, vests unwarranted discretion in the Executive Director, and provides no standards for exercise of that discretion. The commentator references his "comments infra regarding Executive Director's 'authority.'" The commentator

asserts that the admission of attorneys pro hac vice should be determined by the Commission under the well-established standards that govern contested cases and judicial proceedings.

The commentator argues that no legal basis exists for restricting pro hac vice admission to one case per year and he points out that neither the State courts nor the Office of Administrative Law has this restriction. Citing R. 2:21-2(b) (A) through (F), the commentator points out that the availability of in-State counsel is "only one of several disjunctive and individually-sufficient reasons for admission pro hac vice." The commentator states that the desire to enhance the revenue of New Jersey attorneys is not a cognizable consideration in any court or forum and it may well be illegal.

The commentator asserts that the proposed rule appears to violate the right to choice of counsel as articulated in *Fuller v. Diesslin*, 868 F.2d 604 (3rd Cir. 1989), cert. denied sub nom. *Perretti v. Fuller*, 493 U.S. 873, 110 S.Ct. 203, 107 L.Ed. 2d 156 (1989) and similar decisions, because it imposes an arbitrary basis for denial.

The commentator asserts that the proposed rule is confusing and unfair in practice. He points out that an out-of-state attorney could be denied admission pro hac vice prior to the

determination that the matter is a contested case and then be admitted pro hac vice after transfer to the Office of Administrative Law. The commentator argues that the proposed rule would burden the client with having to hire two attorneys for the same case. The commentator questions whether an attorney admitted pro hac vice in the OAL would be permitted to address the Commission on an interlocutory appeal or on an application after the OAL decision. The commentator also questions whether an attorney admitted before the OAL would be automatically barred before the Commission, under the "one case per year" rule. Referencing R. 1:21-2(d), the commentator argues that an attorney disqualified under the proposed rule may well be admitted pro hac vice in a judicial appeal of the same matter which would burden the client with hiring two lawyers for the same case.

The commentator suggests that the provision in subsection (c) for the automatic and mandatory refusal to consent and the resulting additional costs and delay for the defendant is unfair, arbitrary and may violate the precepts of Fuller.

The commentator asserts that the rationale for the proposed rule is to enhance the income of New Jersey attorneys, which is not one of the Commission's functions. The commentator states that the Commission should propose a simple rule patterned

after R. 1:21-2 allowing pro hac vice admission on application to and approval by the Commission and providing that counsel admitted pro hac vice before the OAL may appear before the Commission in the same matter without further application or approval.

RESPONSE: The Commission disagrees that subsection (a) of the proposed rule is unclear or contradictory to subsection (b). Subsection (a) clearly states that it applies to any matter before the Commission or its stewards. Subsection (b) provides that "[a]n attorney from any other jurisdiction, of good standing there, or an attorney admitted in this State, of good standing, who does not maintain a bona fide office for the practice of law here, may, upon application to and at the discretion of the Executive Director, be admitted once per calendar year to appear pro hac vice in a matter pending before the Commission or its stewards." Contrary to the commentator's assertion, subsection (b) in no way contradicts subsection (a).

The Commission disagrees with the commentator's contention that the delegation of this authority to the Executive Director is improper. This delegation, to address applications for admission pro hac vice for matters pending before the Commission and stewards, through a duly-promulgated rule lies within the authority of the Commission and is consistent with law. The

Commission also hereby incorporates by reference its responses to the comments set forth above including its response to Comment 2, 6 and 7.

The Commission also does not agree with the commentator's position that no legal basis exists for restricting pro hac vice admission to one case per year and he points out that neither the State courts nor the Office of Administrative Law has this restriction. In advancing this argument, the commentator relies upon federal case law this is clearly inapposite. For example, in *Fuller v. Diesslin*, 868 F.2d 604, 607-08 (3d Cir. 1989), the court determined that the defendant's Sixth Amendment constitutional right to the assistance of counsel in a criminal proceeding was violated when a State court denied admission pro hac vice to his selected attorney without an adequate record or reasons. In reaching this decision, the court pointed out that although a defendant in a criminal proceeding may request the pro hac vice admission of counsel, the Sixth Amendment does not require the courts to approve the request. *Id.* at 607. Contrary to the case law cited by the commentator, a racing licensee in an administrative matter before the Commission or its stewards, which does not raise constitutionally-protected issues related to

incarceration and liberty, does not have a Sixth Amendment constitutional right to have an attorney admitted pro hac vice.

The Commission disagrees with the commentator's assertion that the proposed rule is confusing and unfair because a licensee might choose to hire two different attorneys if the Commission denied admission pro hac vice to his selected out-of-state attorney but the OAL subsequently granted the request after the matter was transmitted to it as a contested case. The Commission does not agree that the rule would be unfair. In these circumstances, it is up to the racing licensee to choose whether to use a different attorney at the OAL if a request for admission pro hac vice in that forum is granted. A licensee could also decide to utilize the same attorney at the OAL who represented him before the Commission, hire a different attorney or represent himself pro se. The proposed rule does not unfairly or improperly limit a licensee's options for representation. A licensee may certainly choose to use a different attorney to represent him in the different forums referenced by the commentator. Even when the constitutional Sixth Amendment right to counsel attaches to a criminal proceeding, the courts have consistently held that there is no absolute right to counsel of choice. See *Fuller v. Diesslin*, supra, 868 F.2d at 607-08. Moreover, resolution of the hypothetical questions raised by the

commentator would depend upon the specific facts at issue which would be examined in connection for any request for admission pro hac vice.

The Commission does not agree with the commentator's contention that the rationale for the proposed rule is to enhance the income of New Jersey attorneys. As set forth in the Summary, the Commission has proposed N.J.A.C. 13:70-1.41 "in response to a pattern of practice in which an attorney who is not licensed to practice in New Jersey seeks multiple admissions pro hac vice over the course of a calendar year to appear in Commission matters." The Commission notes that "there is no lack of experienced attorneys admitted in this State who have expertise in this area of law." The choice of how to resolve this perceived abuse by repeated admissions pro hac vice lies within the Commission's discretion and it declines the commentator's suggestion that it should propose a simple rule patterned after R. 1:21-2.

COMMENT 23: The commentator states that each of his foregoing comments applies to Commission's proposed new rules set forth at 13:71-1.27 through 1.36. The commentator asserts that the Commission's proposal of essentially identical rules for Chapter 70 and Chapter 71 is duplicative and confusing. According to the

commentator, the duplicate rules may lead to contradictions and anomalies in implementation. As examples, the commentator questions whether a thoroughbred horsemen's organization would be an "interested party" with respect to all horse racing or must it qualify separately under Chapter 70 and 71. The commentator also questions whether an attorney admitted pro hac vice in a thoroughbred matter would be precluded from admission pro hac vice in a harness matter.

The commentator points out that virtually all of the underlying statutes applicable to racing are unitary and the duplicate rules fail to account for the inevitable overlap in the allocation of race days for the Meadowlands, the competition for simulcasting funds among the thoroughbred and harness tracks and organizations and other issues. The commentator recommends that the Commission should propose a single set of rules to govern procedures for all forms of racing.

RESPONSE: Because the commentator states that his foregoing comments regarding proposed rules N.J.A.C. 13:70-1.32 through -1.41 also apply to Commission's proposed new rules set forth at N.J.A.C. 13:71-1.27 through 1.36, the Commission will also publish this summary of his comments and the Commission's response

to these comments in the New Jersey Register in connection with the adoption of 13:71-1.27 through 1.36.

The Commission does not agree that its proposal of essentially identical rules for Chapter 70 and Chapter 71 is confusing or improper. The proposal of these rules in both chapters will make them readily available to those licensees who are primarily familiar with the chapter that applies to the breed of horses they race. The Commission does not believe that the duplicate rules will lead to contradictions and anomalies in implementation and does not understand the commentator's examples. For example the term "interested parties" is defined in both chapters to mean "those persons or entities that are identified by statute and given the express authority to submit applications, comments or other information to the Commission for its consideration before or when reaching a decision at a scheduled meeting." N.J.A.C. 13:70-1.34; N.J.A.C. 13:71-1.29. Given the fact that both rules reference the same statutes applicable to racing, it is unclear how this definition would be confusing. The commentator's assertions that the proposed rules fail to account for the inevitable overlap in the allocation of race days for the Meadowlands, the competition for simulcasting funds among the thoroughbred and harness tracks and organizations as well as other

issues are similarly unclear. For example, the statutes applicable to the allocation of race dates and the competition for CSSF monies do not differentiate the procedures to be used in connection with thoroughbred racing and harness racing. The Commission believes that the placement of the proposed procedural rules in each chapter will serve to increase access to these rules.

COMMENT 24: The commentator asserts that the Commission's vote to publish these proposed rules at its April 30, 2008 was a nullity because the text of the proposed rules "was withheld from the public at that time, and indeed has never been released." The commentator contends that the Commission's failure to make the proposed rules public violated the OPMA, the Open Public Records Act ("OPRA") and other applicable law. The commentator references a statement the Commission made at the meeting indicating that its approval of the draft, proposed rules for publication was subject to legal review. The commentator states that it is unknown whether the rule proposals published on July 21, 2008 are identical to those put before the Commission on April 30, 2008. The commentator expresses the suspicion that "given the extra ordinary [sic] length of time between the vote on April 30th and the publication on July 21, it appears likely that some additional activity occurred in the

interim." Finally, the commentator asserts that the Commission discussed matters pertaining to the proposed rules in a closed session on April 30, 2008 in violation of the OPMA because the Commission "did not specify the time and circumstances under which the discussions would be disclosed to the public." The commentator adds that he has substantial doubt as to the propriety of discussing rule proposals in closed session.

For these reasons, the commentator asserts that the Commission should reconsider and, if appropriate, readvertise the rule proposals in conformity with applicable law. The commentator also asserts that the Commission must also release the minutes of its closed sessions on April 30, 2008 regarding the proposed rules, provide the public with the text of the rule proposals and refrain from discussing rule proposals in closed session.

RESPONSE: The Commission disagrees with the commentator's contention that the proposal of these rules was contrary to law. The Commission voted to move forward with the publication of these proposed rules subject to legal review. After the completion of legal review by counsel for the Commission, the proposed rules were administratively reviewed by the Department of Law and Public Safety, Governor's Office and Smart Growth Ombudsman. On or about June 10, 2008, the Commission transmitted the proposed rules to the

OAL. Pursuant to the OAL's publication schedule, the soonest proposed rules received after June 5, 2008 (but before June 19, 2008) could be published in the New Jersey Register was July 21, 2008. Contrary to the commentator's suspicions of wrongdoing, the rule-making process is a time-consuming process that can take several months before the necessary reviews and approvals are obtained.

The proposed procedural rules were published in the New Jersey Register on July 21, 2008 with provision for a 60-day comment period. The commentator and others have taken advantage of this comment period and made their views known to the Commission. The Commission does not agree that the proposal of these rules was contrary to law. Contrary to the commentator's assertion, the proposed rules have been made known to the public in full compliance with the requirements of the APA. The Commission rejects the commentator's allegation that the rule proposal violated the OPRA as no document request pursuant to that Act has been made. The Commission also rejects the commentator's allegation that the Commission violated the OPMA by discussing the proposed rules in closed session when it failed to specify the time and circumstances under which the discussions would be disclosed to the public. Contrary to the commentator's contention, the minutes of the April

30, 2008 executive session document that no discussion of the proposed rules took place.

The Commission does not agree with the commentator's assertion the Commission should reconsider and, if appropriate, readvertise the rule proposals in conformity with applicable law. In regard to the commentator's assertion that the Commission must release the minutes from the executive session held on April 30, 2008, the Commission notes that it has already done so in response to legally-cognizable requests such as those made pursuant to the OPRA. In fact, as the commentator admits below beginning in Comment 26, the executive minutes of the Commission are in his possession. The Commission reiterates the fact that pursuant to the requirements of the APA, the text of the proposed rules was made available to the public through publication on July 21, 2008. Finally, the Commission rejects the commentator's assertion that the Commission must refrain from discussing rule proposals in closed session. N.J.S.A. 10:4-12(b) authorizes the exclusion of the public from that portion of a meeting at which the public body discusses the matters enumerated therein. These matters include discussions protected by the attorney-client privilege as well as discussions of pending or anticipated litigation. The OPMA does not prohibit

the discussion of proposed rules that when that discussion falls within the exclusions set forth in N.J.S.A. 10:4-12(b).

COMMENT 25. The commentator indicates that the NJTHA requests that the Commission consider the proposed rules at a special public meeting and not as an agenda item during a "regular meeting." The commentator asserts that the NJTHA "and likely others" wish to appear at the meeting, be heard, and have their views considered without the press of other Commission business. The commentator states that the meeting must be a "true public meeting, without the improper 'closed session' discussion that was rejected by the Casino Fund decision."

The commentator reiterates the argument that all deliberations on the proposed rules must occur on the record in the public meeting and that there should not be a pre-arranged motion or a pre-ordained outcome. The commentator argues that the law and interests of fundamental fairness require a complete record and a full transcript of the Commission's proceedings for submission to the Governor under N.J.S.A. 5:5-22.1 and in the event of an appeal.

RESPONSE: The Commission disagrees with the commentator's suggestion that the proposed rules should be addressed at a special meeting of the Commission in order to allow the NJTHA and others to

appear at the meeting, be heard, and have their views considered without the press of other Commission business. Consistent with the requirements of the APA, the public was given a 60-day comment period, from July 21, 2008 through September 19, 2008, to submit their comments, arguments and views to the Commission regarding the proposed rules. The NJTHA, and others, have taken full advantage of this period by submitting written comments that set forth its position on all aspects of the proposed rules. The Commission does not agree that a special meeting is warranted or necessary to allow for further comment outside of the 60-day period that concluded recently.

The Commission acknowledges the commentator's assertion that the meeting must be a "true public meeting" without an improper closed session, a pre-arranged motion or a pre-ordained outcome so that a complete record and a full transcript will be available for submission to the Governor under N.J.S.A. 5:5-22.1 and in the event of an appeal. The Commission responds that its consideration of the proposed rules and the comments received will be consistent with all applicable laws. The Commission notes that N.J.S.A. 5:5-22.1 requires the agency to deliver a true copy of the minutes of its meeting to the Governor -- not a complete record.

COMMENT 26: The commentator states that counsel for the NJTHA filed an OPRA request with the Governor's Office seeking copies of the Commission's executive minutes and related documents which was responded to under cover letter dated September 9, 2008. The commentator submitted the response to his OPRA request in connection with Comments 26 through 41. Alleging that the Governor's Office failed to provide a copy of the Commission's June 18, 2008 meeting, the commentator suggests that the Commission may not have transmitted the minutes of this meeting pursuant to N.J.S.A. 5:5-22.1.

RESPONSE: Contrary to the commentator's suggestion, the Commission delivered a true copy of the minutes of the June 18, 2008 meeting and accompanying documents to the Governor's Office in full compliance with N.J.S.A. 5:5-22.1.

COMMENT 27: The commentator cites several sections of the redacted Commission's minutes from 2006 through the present provided by the Governor's Office in response to his OPRA request. The commentator alleges that the minutes establish various violations of law by the Commission and the proposed rules "codify" these prior procedures. The commentator contends that the Commission must identify these past practices which violate the law in public session and in the rule proposal and argues that the

Commission must propose specific rules to prevent future violations.

RESPONSE: The Commission disagrees with the commentator's contention that the proposed rules set forth procedures that violate the law. The proposed procedures are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. The text of the proposed rules speaks for itself. The Commission also hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2 and 10.

COMMENT 27A [a "2nd comment 27" by the commentator]: The commentator contends that the proposed rules must prohibit the discussion of substantive information in executive session.

RESPONSE: The Commission disagrees with the commentator's contention that the proposed procedural rules must prohibit alleged violations of law. The proposed procedures are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 10 and 27.

COMMENT 28: The commentator contends that the net result of the proposed rules would be to perpetuate improper closed-door discussions and decisions, while precluding any participation by the live racing community or the public, especially in the context of the allocation of race dates.

The Commission's proposed rules "codify" its past practices which were fundamentally improper. The Commission must propose procedural rules that preclude discussion and agreement in connection with the allocation of racing dates in executive session and allow public participation in the process.

RESPONSE: The Commission disagrees with the commentator's contention that the proposed procedural rules must prohibit alleged violations of law. The proposed procedures are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 10, 27 and 27A.

COMMENT 29: The commentator argues that the proposed procedural rules should ensure that the minutes of the Commission's executive session are complete, accurate, substantive and subject to objective verification. According to the commentator, beginning in April 2008, reflected a major and deleterious change from prior

practices. Citing N.J.S.A. 5:5-22.1, the commentator argues that minutes such as these, which provide no substantive information to the Governor's Office, thwart the statute.

The commentator states that the proposed rules should require that the minutes identify individual speakers, include the substance of their statements, and require that the executive sessions be sound recorded as the public sessions are. According to the commentator, these changes would not impose a burden on the Commission, since its executive sessions are held at the same time and place as its public sessions, and the Commission produced reasonably substantive executive session minutes prior to April 30, 2008.

RESPONSE: The Commission disagrees with the commentator that the proposed changes are warranted or necessary. The proposed rules are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 10, 27, 27A and 28.

COMMENT 30: Referencing Comment 1, summarized above, the commentator states that the proposed procedural rules codify past practices of the Commission that are contrary to law.

RESPONSE: The proposed rules are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 10, 27, 27A, 28 and 29.

COMMENT 31: Referencing Comment 7, summarized above, the commentator alleges that the Commission's minutes establish instances in which the Executive Director has provided information to, effectively instructed and controlled the Commission's proceedings.

RESPONSE: The proposed rules are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 6, 7, 10, 13, 15, 16, 18 and 19.

COMMENT 32: Referencing Comment 8, summarized above, the commentator alleges that the Commission's minutes document instances in which the Commission received substantive information from sources not employed by the Commission as well as from "staff" during executive session. The commentator reiterates his position

that the proposed procedural rules must provide for the submission of admissible evidence and prohibit the receipt of information in executive session or under other improper circumstances.

RESPONSE: The proposed rules are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 8, 10 and 25.

COMMENT 33: Referencing Comment 9, summarized above, the commentator alleges that the Commission's minutes document instances in which a decision was reached in executive session whether or not to allow comments from the racing community and the public. The commentator argues that the proposed rules would further, and improperly, restrict the public's ability to address the Commission. The commentator also argues that the minutes document the Commission's failure to allow the NJTHA to fulfill its alleged statutory mandate of representing the thoroughbred racing community.

RESPONSE: The proposed rules are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth

above including its responses to Comments 1, 2, 8, 9, 10, 16, 17, 18, 20, and 25.

COMMENT 34: Referencing Comment 10, summarized above, the commentator alleges that the Commission's minutes document instances of the abuse of executive sessions in which information was provided, substantive discussion took place and decisions were reached.

RESPONSE: The proposed procedures are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 10, 30, 31, 32 and 33.

COMMENT 35: Referencing Comment 11, summarized above, the commentator states that the Commission may not have complied with N.J.S.A. 5:5-22.1 as to its June 2008 meeting. Arguing that the Commission's minutes of its executive sessions since April 2008 have been uninformative and insubstantial, the commentator asserts that the proposed procedural rules must ensure prompt and meaningful compliance with this statute.

RESPONSE: The proposed procedures are fully consistent with the APA, OPMA, due process, other applicable laws and the

court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 11, 26 and 29.

COMMENT 36: Referencing Comment 12, summarized above, the commentator states that the Resolutions approved by the Commission for adjourning into executive session fail to comply with OPMA because they do not specify a date or circumstances under which executive session minutes would be released. The commentator also reiterates his contention that the Commission has never released any executive session minutes. The commentator argues that the proposed procedural rules must include provisions governing these Resolutions and require a specification as to why each item is eligible for executive session, a statement as to when or under what circumstances the executive session minutes will be released and establish a procedure for timely release.

RESPONSE: The Commission disagrees with the commentator's assertion that the Commission has never produced copies of the minutes of its executive sessions. The Commission believes that the requirements for the disclosure of executive minutes are sufficiently addressed in the OPMA and a procedural rule is not necessary. The procedures as proposed are fully consistent with the APA, OPMA, due process, other applicable laws and the court's

decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 10, 12, 26, 27 and 29.

COMMENT 37: Referencing Comment 17, summarized above, the commentator alleges that the Commission's minutes document improper restrictions on access to the Commission and violations of due process. According to the commentator, the proposed procedural rules must prevent these practices and not restrict the public's access to information

RESPONSE: The proposed procedures are fully consistent with the APA, OPMA, due process, other applicable laws and the court's decision in IMO CSSF. In addition, the Commission hereby incorporates by reference its responses to the comments set forth above including its responses to Comments 1, 2, 7, 10, 16, 17, 19, 20, 27, 27A and 28.

COMMENT 38: Referencing Comment 19, summarized above, the commentator alleges that the Commission's minutes document the improper discussion and decisions related to the allocation of the Casino Fund.

RESPONSE: The comment does not reference or apply to the proposed procedural rules. To the extent that the commentator

relies upon Comment 19 above, the Commission hereby incorporates by reference its response to that comment.

COMMENT 39: Referencing Comment 20, summarized above, the commentator states that the Commission's minutes document that the Commission discussed and decided the allocation of racing dates in executive session.

RESPONSE: The comment does not reference or apply to the proposed procedural rules. To the extent that the commentator relies upon Comment 20 above, the Commission hereby incorporates by reference its response to that comment.

COMMENT 40: Referencing Comment 24, summarized above, the commentator reiterates his arguments that the Commission improperly approved the publication of the proposed procedural rules without providing a copy to the public. The commentator alleges that the Commission discussed the substance of the proposed procedural rules in executive session at its April 30, 2008 meeting and that there was a pre-existing agreement to codify its past practices

RESPONSE: The Commission disagrees with the commentator's allegations and incorporates by reference its responses to the comments set forth above including its responses to Comment 1, 2, 10, 12 and 24.

COMMENT 41: The commentator indicates that he repeats the request of the NJTHA for a public hearing regarding the proposed procedural rules published on July 21, 2008 in Chapter 70 and Chapter 71.

RESPONSE: The NJTHA's request for a public hearing was not made within the time frame required by the APA. Pursuant to N.J.S.A. 52:14B-4(a)(3), an agency must conduct a public hearing if sufficient public interest is shown "provided such request is made to the agency within 30 days following publication of the proposed rule in the Register." Although the proposed rules were published in the New Jersey Register on July 21, 2008, the NJTHA's request for a public hearing was not filed until September 2, 2008 -- 43 days after the publication of the proposed rules. As a result, pursuant to the clear provisions of the statute, the request for a public hearing was not timely made. Moreover, the provision of a 60-day comment period for the proposed procedural rules afforded the NJTHA and others with ample opportunity to submit comments on the proposed rules and to offer alternatives for the Commission's consideration. Here, the NJTHA clearly took advantage of that opportunity and filed extensive comments for the Commission's consideration.

In addition, the NJTHA's request for a public hearing did not meet the standard of "sufficient public interest" as required by N.J.A.C. 13:1E-4.3. Pursuant to N.J.A.C. 13:1E-4.3(b), "sufficient public interest" is shown when "[a]t least 50 persons submit written requests to hold a public hearing to present data, arguments or views that raise a substantial issue as to the impact of the proposal on the regulated community or the general public that has not been anticipated by the agency and no other public hearing on the proposal has been scheduled or held." The only request for a public hearing was filed on behalf of the NJTHA. As clearly set forth in N.J.A.C. 13:1E-4.3(c), for the purposes of determining sufficient public interest, "a professional organization or law firm that submits a request for a public hearing on behalf of a group of interested parties shall be considered one person." As a result, in addition to being made out of time, the NJTHA's request for a public hearing does not meet the necessary standard of "sufficient public interest."

On September 19, 2008, John M. Pellecchia, Esq. filed the following comments with the Commission on behalf of Penwood Racing, Inc. and Greenwood ACRA, Inc.

COMMENT: The commentator indicates concurrence with the proposed rules published at 40 N.J.R. 4295 and 4300 (July 21, 2008)

which satisfy the Appellate Division's directive in IMO CSSF. The commentator points out that once the proposed rules are adopted, the Commission will be able to proceed with distributions of the CSSF monies which will benefit the New Jersey horse racing industry. The commentator summarizes the IMO CSSF decision and the procedural history of the events thereafter including the Motion in Aid of Litigant's Rights filed by the NJTHA, the publication of the proposed procedural rules and the court's denial of the NJTHA's motion. The commentator indicates that "[a]lthough the rules as proposed are consistent with statutory and case law," he proposed two minor revisions which would clarify the proposed due-process procedures.

First, the commentator states that the text proposed rules N.J.A.C. 13:70-1.35(b) and N.J.A.C. 13:71-1.30(b) should be amended to change "[i]n the discretion of the Executive Director, the Commission may allow further written comment from the interested parties before the date upon which the Commission is scheduled to act" to "[t]he Commission will accept further written comment from the interested parties before the date upon which the Commission is scheduled to act." The commentator indicates that the revision will clarify that all interested parties will have a

chance to present written arguments in response to evidence submitted, as required by the IMO CSSF decision.

Second, the commentator states that the text proposed rules N.J.A.C. 13:70-1.35(d) and N.J.A.C. 13:71-1.30(d) should be amended to change "[t]he Commission may, in its discretion, allow an interested party to comment verbally prior to Commission action at the scheduled public meeting" to "[t]he Commission may, in its discretion, allow an interested party to comment orally prior to Commission action at the scheduled public meeting." The commentator indicates that the word "orally" should be replaced throughout subsection (d) with "verbally." Quoting Webster's New World Dictionary 1587 (4th ed. 1999), the commentator states that the word "verbal" means "of, in, or by means of words" which includes both oral and written communication. The commentator indicates that use of the word "oral" will clarify the Commission's intent to allow interested parties to be heard at a meeting.

RESPONSE: The Commission thanks the commentator for supporting the proposed rules and notes that the commentator is correct in pointing out that the Commission may proceed with the distribution of CSSF monies once the rules are adopted.

The Commission also thanks the commentator for suggesting minor revisions to N.J.A.C. 13:70-1.35 and N.J.A.C. 13:71-1.30.

However, the Commission believes that the rules as proposed are sufficiently clear and the procedure established therein is consistent with the requirements of due process and other applicable laws. Should the procedure set forth in N.J.A.C. 13:70-1.35(b) and N.J.A.C. 13:71-1.30(b) prove insufficient in affording interested parties the opportunity to be heard, the Commission may consider the suggested revision at that time. The Commission believes that the use of the word "verbal" and the context in which it is used in N.J.A.C. 13:70-1.35(d) and N.J.A.C. 13:71-1.30(d) are sufficiently clear to establish that it is the Commission's intent to consider requests for "oral" comments.

On July 28, 2008, Barbara Sachau filed the following comment with the Commission.

COMMENT: The commentator questions why the proposed rules do not address the welfare of race horses and states that the Commission should consider this issue in every decision it makes. The commentator asserts that race horses are being abused and asks when the interests of the public in protecting the horses get heard. The commentator also questions why procedural rules are necessary to address the Commission.

RESPONSE: These procedural rules are being proposed pursuant to N.J.S.A. 52:14B-3(2) which requires that the Commission

"adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available...." The Commission commends the commentator for her concern about the welfare of race horses and points that the proposed rules address the procedures required by N.J.S.A. 52:14B-3(2) and not substantive concerns such as those raised by the commentator. The Commission disagrees with the commentator's suggestion that the rules do not provide the public with an adequate opportunity to raise issues before the Commission.

Federal Standards Statement

A Federal standards analysis is not required because the rules of racing are dictated by State statute, N.J.S.A. 5:5-22, et seq., and the adopted amendment is not subject to any Federal requirements or standards.

The rule text of the adopted rule can be found in the New Jersey Register at 40 N.J.R. 4300(a).

Frank Zanzuccki, Executive Director