

Axinn Antitrust Insight: “New” HSR Form Remains in Effect For Now – Fifth Circuit Temporarily Freezes District Court Order that Vacated the New HSR Rule

2 MIN READ

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What You Need to Know

- The FTC has appealed the district court's judgment vacating the new HSR Rule and Form.
- On Thursday, February 19, the Fifth Circuit issued a temporary, administrative stay of the district court's judgment.
- The practical effect is that the new HSR Form remains in place until further ruling from the Fifth Circuit.
- We expect the Fifth Circuit will issue its ruling on a full stay by March 2, as requested by the FTC.

As we anticipated, the FTC has appealed Judge Kernodle's judgment in *Chamber of Commerce v. Federal Trade Commission* that vacated the FTC's new HSR Rule and Form. Following Judge Kernodle's decision to deny a further stay of the judgment, the FTC sought emergency relief from the Fifth Circuit. The FTC's motion requested (i) an administrative stay of the judgment until March 2 (which the Chamber did not oppose), (ii) a full stay of the judgment through the conclusion of the appeal, and (iii) a ruling on the full stay by March 2.

The Fifth Circuit has now granted the administrative stay, a temporary measure maintaining the status quo while the appellate court considers whether to grant a full stay of the judgment during the pendency of the entire appeal. In other words, the Fifth Circuit's temporary pause does not necessarily mean that it will grant the full stay.

The FTC asked that the Fifth Circuit rule on its full stay motion by March 2. The appellate court issued an expedited briefing schedule for the stay motion, with the final brief due by February 26. That schedule suggests the Fifth Circuit will decide whether to extend the stay on or before March 2. If the court grants the full stay, the new HSR Form will remain in place throughout the entire appeal. If the court denies the stay, or does not rule as requested by March 2, the FTC may seek additional relief from the Supreme Court to keep the new HSR Form in place.

Bottom line: For now, and until the Fifth Circuit rules otherwise, merging parties should continue to use the new HSR Form. If the Fifth Circuit lifts the stay, and the FTC does not otherwise secure relief from the Supreme Court, merging parties will “pivot[] to the old form,” as the FTC previewed in its briefing before the district court. This shift will not be difficult, but for parties on the cusp of a filing, it may require preparing both versions in parallel.

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