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HSR “Re-Form”: Fifth Circuit Administrative Stay Keeps FTC’s Expanded HSR Filing Requirements in Effect (for now)

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By Fiona Schaeffer, Adam Di Vincenzo, Alexis Brown-Reilly,
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HSR “Re-Form”: Fifth Circuit Administrative Stay Keeps FTC’s Expanded HSR Filing Requirements in Effect (for now)

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The Fifth Circuit has entered an administrative stay of the district court’s vacatur “until further order,” and the Federal Trade Commission’s (FTC’s) Premerger Notification Office has directed filers to continue submitting the revised HSR form unless and until further notice.¹

Approximately a year ago, the FTC, with support from the Department of Justice Antitrust Division (DOJ), implemented a final rule² (the “Rule”) establishing a new premerger notification form and instructions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”). The new HSR form significantly expanded the information and documents parties are required to provide to the FTC and DOJ at the outset of merger reviews, increasing the time and cost of complying with HSR filing requirements. [Milbank’s client alert](#) on the new form summarizes these requirements.

On February 12, 2026, Judge Kernodle of the District Court for the Eastern District of Texas vacated the Rule, and with it the new HSR form in its entirety. The court sided with the plaintiffs, led by the US Chamber of Commerce, concluding that the Rule was unlawful on two grounds:

1. it exceeded the FTC’s authority because it was not “necessary and appropriate” to enforce the antitrust laws; and
2. it resulted from “arbitrary and capricious” rulemaking in violation of the Administrative Procedure Act (“the APA”).

Shortly thereafter, on February 19, 2026, the US Court of Appeals for the Fifth Circuit granted the administrative stay of the district court’s judgment “until further order” of the court and set an expedited briefing schedule. The FTC’s brief is due on February 23, and the appellants’ reply is due on February 26.

As a result, the Rule (and the new HSR form) will remain in effect until at least February 26, and likely longer until the Fifth Circuit rules on the case. The Fifth Circuit’s administrative stay does not resolve the merits of the appeal. Milbank will continue to monitor developments and provide updates.

Summary of the District Court Opinion

The plaintiffs in *Chamber of Commerce of the United States of America et al. v. Federal Trade Commission et al.*, No. 6:25-cv-9 (E.D. Tex.), filed their complaint in January 2025, shortly before the Rule took effect. They challenged the Rule on two grounds: (1) the FTC exceeded its authority under the HSR Act, and (2) the Rule was arbitrary and capricious under the APA. The court agreed with the plaintiffs on both counts.

First, the court found that the FTC exceeded its authority because, while the HSR Act authorizes the FTC to specify premerger notification requirements, it limits that authority to information “necessary and appropriate” to assess whether a proposed transaction may violate the antitrust laws. The court determined that the “necessary and appropriate” language in the statute required the FTC to specify the benefits of the revised form or establish that these benefits outweighed its costs.

Second, the court held that the FTC’s rulemaking was “arbitrary and capricious” under the APA, citing two principal deficiencies: (1) the FTC did not adequately demonstrate that the Rule’s asserted benefits “bear a rational relationship” to its costs; and (2) the FTC’s rejection of proposed alternatives rested on “improper reasoning” and failed to consider an “important aspect of the problem.”

Since the Rule took effect on February 10, 2025, parties to HSR-reportable transactions have had to gather and submit substantially more information at the outset of the merger review process to complete an extensive premerger notification form. Under the prior regime, parties submitted an HSR filing with a narrower set of information and documentary materials.

¹ *Chamber of Commerce of the United States of America v. FTC*, No. 26-40094 (5th Cir. Feb. 19, 2026) (order granting administrative stay and setting expedited deadlines); FTC Premerger Notification Program, Special Highlights (Feb. 19, 2026) (directing filers to continue submitting the revised form; noting 2026 thresholds/fees are in effect).

² Premerger Notification; Reporting and Waiting Periods Requirements, 89 Fed. Reg. 89,216 (Nov. 12, 2024) (the “Rule”).

The agencies had and continue to have the ability to seek additional information from merging parties through the issuance of voluntary access letters or Second Requests.

In *Chamber of Commerce*, the court determined that the FTC did not establish that the prior HSR filing form was ineffective in allowing the FTC and DOJ to determine whether a Second Request was needed to allow the reviewing agency to evaluate the potentially harmful effects of a proposed transaction. Moreover, the FTC conceded that the new form tripled the costs for filing parties compared with the prior form—based on cost estimates that many dealmakers have since found to be vastly understated.

The court found that the incremental benefits of the revised form were unsubstantiated, and that the FTC’s goal of “preventing illegal mergers” could be achieved through less costly means—namely, compliance with the prior form.

Summary of the FTC’s Appeal to the Fifth Circuit

The FTC appealed to the Fifth Circuit and sought emergency relief, including (i) an administrative stay (now granted) and (ii) a stay pending appeal.³ In its motion, the FTC argues, among other things, that plaintiffs lack standing; that the district court imposed an unsupported standard for “necessary and appropriate” rulemaking; and that neither the HSR Act nor the APA requires the FTC to identify a specific past “missed” illegal merger to justify a more robust initial filing. The FTC also contends that the Rule is not “arbitrary and capricious” because the FTC considered costs, benefits and alternatives in the rulemaking record, and that vacatur would cause irreparable harm by depriving the FTC and DOJ of information needed for initial screening—including foreign-subsidy disclosures Congress directed the FTC to collect—while creating uncertainty for transactions in process.

Takeaways

For deal teams, the immediate questions are (i) which HSR form to use now, and (ii) how quickly that could change as the Fifth Circuit considers the FTC’s request to stay pending appeal. We will continue to monitor the Fifth Circuit proceedings and any updated guidance from the FTC’s Premerger Notification Office. Below are important considerations as the case moves forward:

- **Expanded HSR Form Stays in Effect (for now):** The Rule’s requirements remain in place and parties subject to HSR filing requirements must continue to use the new form. The Rule was passed with bipartisan support in 2025 and combined with the FTC recently filed motion to the Fifth Circuit, the FTC is unlikely to abandon efforts to defend the Rule.
- **Chair Ferguson’s Concurrence:** When the Rule was adopted, Chair Ferguson (then commissioner) stated in his concurrence to promulgating the Rule that (1) “the additional information sought in the Final Rule is ‘necessary and appropriate’ for the Antitrust Agencies to identify transactions that may violate the antitrust laws,” and (2) the rulemaking “satisfied the APA’s procedural requirements.”⁴ Chair Ferguson also noted, however, that “[i]f post-promulgation experience teaches us that some parts of the rule are not working well, we can and should get rid of them in subsequent rulemakings.”⁵
- **Potential New Rulemaking:** The FTC’s Fifth Circuit motion suggests it may need to engage in new rulemaking if the district court’s order is upheld on appeal. Depending on the outcome on appeal, the revised form could remain in place, or the FTC could pursue a narrower rule proposal through notice-and-comment rulemaking.

Following the district court’s guidance, any new form or heightened premerger requirements should be based on a careful assessment of the incremental benefits that modifications would provide, and evidence that any costs of utilizing the new form (and any additional information or documents required) are narrowly tailored towards achieving those benefits.

³ Defendants-Appellants’ Emergency Motion for Administrative Stay and Stay Pending Appeal, *Chamber of Commerce of the United States of America v. FTC*, No. 26-40094 (5th Cir. Feb. 18, 2026).

⁴ Andrew N. Ferguson, Comm’r, Fed. Trade Comm’n, *Concurring Statement of Commissioner Andrew N. Ferguson in the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule*, 16 C.F.R. Parts 801 and 803 3, 15 (Oct. 10, 2024).

⁵ *Id.* at 14.

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