

Alert | Equine Industry Group



February 2023

Update: Fifth Circuit Again Reins in HISA

The Fifth Circuit Court of Appeals on Jan. 31 denied motions by the Horseracing Integrity and Safety Authority (HISA) and the Federal Trade Commission (FTC) to vacate or rehear the Court's November 2022 ruling, which held that the Horseracing Integrity and Safety Act (Act) violated the private-nondelegation doctrine and was thus facially unconstitutional. This ruling comes after some challenging months for the FTC and HISA and a flurry of litigation in multiple federal courts. See [GT Alert, July 2022](#).

In the wake of the Court's November ruling that the Act was unconstitutional, proponents of the Act added language to the Consolidated Appropriations Act of 2023, passed in December, in an attempt to address the constitutional infirmities the Court raised in its [November order](#). This new legislation replaced the FTC's interim-final rulemaking power with the general rulemaking power to "abrogate, add to, and modify" rules promulgated under the Act "as the Commission finds necessary or appropriate to further the purposes of the Act." 15 U.S.C. 3053 (e). In the wake of this legislative fix, HISA and the FTC filed their motions, arguing the new legislation addressed the Court's constitutional concerns. The Court rejected these arguments and issued its Mandate to the District Court for the Northern District of Texas for further proceedings.

Furthermore, the Sixth Circuit Court of Appeals heard oral arguments in December 2022 on similar constitutional changes to the Act and has asked the parties for supplemental briefing "addressing the recent amendments to the (Act) including whether the private delegation claims are now moot." The case has been heard and all briefing submitted. Expectations are for a ruling shortly, and if the Sixth Circuit rules contrary to the Fifth Circuit, a trip to the Supreme Court may await.

Additional complications also arise from these appeals as they pertain to HISA’s resubmission of the Anti-Doping and Medication Rules and the publication of the rule in the Federal Register on Jan. 26. HISA issued the following statement Jan. 31: “In the aftermath of the recent Congressional amendment, and without opining on the newly amended HISA law, the Fifth Circuit has sent the case back to the district court. Outside Louisiana and West Virginia, the Authority will continue enforcing the Racetrack Safety Program and preparing for the implementation of its Anti-Doping and Medication Control Program on March 27, subject to the Federal Trade Commission’s approval of the rules.”

Approval by the FTC is far from certain. On Dec. 12, 2022, in response to the first submission of the Anti-Doping Rule by HISA, the FTC disapproved the proposed rule, stating “that its disapproval arises from the legal uncertainty arising from a recent decision by the U.S. Court of Appeals for the Fifth Circuit, which declared the (Act) unconstitutional.” In a [joint letter](#) to FTC Chair Lina Khan Jan. 25, signed by five senators and five congressmen, the authors urged that the proposed rules be rejected again: “To avoid continued industry-wide confusion and potential inequitable enforcement, it is imperative that you again disapprove the proposed Rule until after the constitutionality of HISA has been resolved.” The Fifth Circuit’s Jan. 31 ruling may strengthen these arguments.

Authors

This GT Alert was prepared by:

- [Rodman Law](#) | +1 973.360.7900 | Rodman.Law@gtlaw.com
- [Madeline Orlando](#) | +1 916.442.1111 | orlandom@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Berlin.~ Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer’s legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig’s Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig’s Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. »Greenberg Traurig’s Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimbengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig’s Warsaw office is operated by GREENBERG TRAURIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAURIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2023 Greenberg Traurig, LLP. All rights reserved.*