

Insights

A NOISY EXIT BY FTC COMMISSIONER WILSON

Feb 16, 2023

Commissioner Christine Wilson announced her resignation from the Federal Trade Commission (“FTC”) on February 14, 2023 in a Wall Street Journal [Op-Ed](#). Commissioner Wilson’s very public resignation confirms the deep divide within the Commission, as FTC Chair Lina Khan and her followers work to expand the agency’s power and renew enforcement efforts that run contrary to legal interpretations practitioners and the business community have relied upon for the past half century. Commissioner Wilson characterized her resignation as a “noisy exit” – which is what an antitrust lawyer advises a businessperson to do when a conversation with a competitor raises alarm bells. The noisy exit is a visible and complete rejection of the activity, and, by analogy here, a stinging rejection of the FTC’s actions.

In her resignation statement, Commissioner Wilson pulled no punches against Chair Khan, leading her op-ed with the following statement:

“Much ink has been spilled about Lina Khan’s attempts to remake federal antitrust law as chairman of the Federal Trade Commission. Less has been said about her disregard for the rule of law and due process and the way senior FTC officials enable her. I have failed repeatedly to persuade Ms. Khan and her enablers to do the right thing, and I refuse to give their endeavor any further hint of legitimacy by remaining.”

The FTC is designed by statute to be bipartisan, as no more “than three of the Commissioners shall be members of the same political party.” 15 U.S.C. § 41. Under the Biden administration, three of the five Commissioners have been Democrats, with a strong focus on activist appointees. The two Republican Commissioners have dissented from many FTC decisions, but the majority, led by Chair Khan, has been able to pursue its agenda over those dissents. According to Commissioner Wilson’s statement, Chair Khan has “consolidated power within the Office of the Chairman, breaking decades of bipartisan precedent and undermining the commission structure that Congress wrote into law.”

Republican Noah Phillips resigned as a Commissioner in October 2022, before his term expired. Although he did not issue a negative public resignation statement, he often joined Commissioner Wilson in challenging Chair Khan’s agenda, arguing that the FTC’s activities exceeded the agency’s legal authority.

Commissioner Wilson’s resignation will leave the FTC with just three commissioners—all from the same political party. Her departure is not likely to change the outcome of FTC decisions, given the unified majority she opposed; however, the absence of dissenters does mean that there will not be public dissenting statements presenting views that were considered by the FTC in its deliberative process. While the Commissioners representing the opposite party of the sitting President have always been disadvantaged in numbers, their presence helps ensure a voice is given to different opinions and provides, at minimum, the appearance of robust debate behind the FTC’s decisions. This bipartisan debate gives FTC decisions more credibility and transparency within the business and legal communities, and provides a roadmap of the FTC’s public policy considerations in its enforcement actions. Ms. Wilson’s scathing remarks upon her “noisy exit” will bring into question that credibility.

Businesses should expect more stringent reviews of proposed transactions and continued efforts by the FTC to expand its authority, including current proposals to [ban non-compete agreements](#) and shifting Obama-era policy regarding [unfair methods of competition](#) under Section 5 of the FTC Act. It might be a bumpy ride.

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