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Phillips Exits FTC As 'Consistent' Voice For Rule Of Law

By **Bryan Koenig**

Law360 (October 17, 2022, 7:44 PM EDT) -- Noah Joshua Phillips ended the more than four years he spent on the Federal Trade Commission on Friday, capping off a tenure that spanned two presidential administrations and led him to pen an array of dissents, statements and speeches questioning whether FTC initiatives were supported by rigorous analysis and comported with the rule of law.

Confirmed by the Senate on April 26, 2018, and sworn in May 2 of that year, the Republican commissioner and former chief counsel to Sen. John Cornyn, R-Texas, and who is now moving to Cravath Swaine & Moore LLP as co-chair of its antitrust practice, spent a large chunk of his tenure on the commission battling calls by the FTC's Democrats to push the bounds of the agency's enforcement power.

But according to Henry C. Su, a former FTC attorney who's now a partner at Bradley Arant Boult Cummings LLP, Phillips was also willing to call out Republicans, penning a number of dissents while the agency was still under GOP control.

"His role has not changed very much under the two administrations. He's been very consistent," said Su, who asserted that Phillips' focus was ensuring enforcement was "carefully considered and fact-based," regardless of who was pushing it.

Phillips first played that role in the majority under Republican Chairman Joseph Simons. But after the balance of power shifted with the election of President Joe Biden, Phillips and fellow GOP Commissioner Christine Wilson were the two voices of dissent against Democrats' efforts to expand the FTC's power, first under acting Chairwoman Rebecca Kelly Slaughter and then under current Chair Lina Khan.

The commission's Democrats have aggressively tried to discourage potentially anticompetitive deals broadly by requiring companies to get prior approval for future deals when they agree to merger clearance settlements, expanding the scope of transaction probes and teasing a potentially dramatic overhaul of merger guidelines and policies. GOP leverage to check those and other efforts has ebbed and flowed with the commission's makeup, which started with three Democrats but was relegated to a 2-2 split when then-Commissioner Rohit Chopra left the agency last fall and led to a monthslong pause on Khan's most aggressive efforts until the Senate confirmed Alvaro Bedoya as commissioner in May.

Even after the Democrats' 3-2 majority was restored, Sidley Austin LLP partner and former FTC official Sean Royall said dissents from the likes of Phillips had an impact, even when minority members can't block a vote.

"There's a lot of opportunity to influence actions behind the scenes," Royall said, noting that agency chairs often prefer consensus, although that seems to be less true in recent years.

When serving in either the majority or minority, antitrust professionals described Phillips and Wilson as a thoughtful voice willing to vote with Democrats, including on enforcement actions, when they felt it appropriate.

"It's not as if they have voted no on everything," said Maureen K. Ohlhausen, a Baker Botts LLP partner who served as acting FTC chair at the beginning of the Trump administration.

Bradley Arant's Su noted that Wilson and Phillips typically tried to speak with one voice, especially in their dissents.

Phillips was equally willing to issue dissenting statements alone, outlining at length why he disagreed with the majority.

"When he's done that, he's done it respectfully," said Royall, who asserted that Phillips has shown himself to be independently minded and "fairly constructive" in his criticisms.

"It's something I think he's going to be remembered for," said Alexander P. Okuliar, a former deputy assistant attorney general for antitrust and current Morrison Foerster LLP partner.

Attorneys pointed to public remarks in which Phillips has decried a "tax" he argues the Democrat majority is imposing on mergers and acquisitions, including by applying increased scrutiny and eliminating the "early termination" of the review waiting period for transactions considered especially innocuous.

"The current hostility towards merger activity is something that Phillips has been vocal against," said Su.

Phillips has similarly decried anticipated agency rulemaking expected to push the bounds of its powers, rulemaking the outgoing commissioner argues is illegal.

"It's elevating those discussions, enforcing a broader engagement across the commission" and with stakeholders, Okuliar said, "that I think has been a hallmark."

Phillips also often complained early in the Biden administration that Republicans were being shut out of the basic decision-making process. But he told Law360 in a recent interview that the process he'd decried has improved.

Baker Botts' Ohlhausen also noted that Phillips has been an extremely active public speaker in front of a wide array of audiences, often aimed at making his voice and perspective known about the direction the FTC is headed.

"He has certainly been a very engaged and engaging commissioner," she said.

Biden has not yet named his pick to replace Phillips. While his replacement must be a new second Republican, attorneys say not to assume a GOP commissioner in the same mold.

However, Sidley's Royall said, "It will need to be somebody who the Republicans in the Senate are confident will stand up" and push back on "anything that appears to be an overreach of agency authority."

Royall noted that in departing when he is, Phillips is leaving plenty of time for his replacement to settle in.

"By stepping down, essentially midterm in this administration, Commissioner Phillips is giving the opportunity to bring somebody in to have a meaningful role in the next couple of years," Royall said.

--Additional reporting by Emily Lever. Editing by Michael Watanabe.

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