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Republican FTC Member Wilson Resigning Over Khan Policy

By **Matthew Perlman**

Law360 (February 14, 2023, 1:25 PM EST) -- The Federal Trade Commission's lone Republican member, Christine S. Wilson, said Tuesday that she plans to leave the agency, citing Chair Lina Khan's "disregard for the rule of law and due process."

Wilson penned an op-ed published in the Wall Street Journal on Tuesday explaining the decision, accusing Khan of abusing government power and questioning the honesty and integrity of the chair and her senior leaders at the FTC.

"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," Wilson wrote. "Accordingly, I will soon resign as an FTC commissioner."

A member of the commission since September 2018, Wilson has become a consistent and stark opponent of policy and process changes implemented after Democrats took control of the agency with the election of President Joe Biden. Just last month, she said that recent rulemakings and other moves by the commission's majority run the risk of creating a backlash that poses an existential threat to the agency.

Wilson contended in Tuesday's op-ed that Khan's disregard for the rule of law and due process make it impossible for her to continue serving as a commissioner. She pointed to Khan's decision **not to recuse** herself from the FTC's challenge of Meta Platform's acquisition of virtual reality developer Within, despite Khan's prior statements and work as a congressional staffer saying all future Facebook deals should be blocked.

Wilson also noted findings from the Federal Employee Viewpoint Survey that Wilson said showed a drop in employees who believe senior FTC officials maintain high standards of honesty and integrity from 87% in 2020 to 49% today.

"Many FTC staffers agree with Ms. Khan on antitrust policy, so these survey results don't necessarily reflect disagreement with her ends," Wilson said. "Instead, the data convey the staffers' discomfort with her means, which involve dishonesty and subterfuge to pursue her agenda."

Khan joined fellow Democratic Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya in a statement Tuesday acknowledging Wilson's resignation and wishing her well.

"While we often disagreed with Commissioner Wilson, we respect her devotion to her beliefs and are grateful for her public service," the statement said. "We wish her well in her next endeavor."

The FTC is designed to have five commissioners, with no more than three from the majority party, but Wilson became the only Republican member when Noah Joshua Phillips left the agency in October. On Monday, President Biden renominated Slaughter to continue in her post, reupping the current lineup's longest-serving member. Wilson's term is not set to expire until 2025.

The immediate practical impact of Wilson's departure should not be significant, since the FTC's three Democrats can still vote to bring agency actions and investigations. But Christopher B. Leach, a partner at Mayer Brown LLP and a former attorney with the FTC, said Wilson's resignation means the loss of a "dissenting voice guiding courts and challengers to the most vulnerable aspects of agency action."

"On a personal note, when I was an FTC attorney, I always appreciated that she respected staff's efforts and their hard work, even if she ultimately voted against some action on policy grounds," Leach said.

BakerHostetler partner Daniel Kaufman, who served as acting director of the FTC's Bureau of Consumer Protection, said Wilson's departure is a huge loss for the commission and for American consumers.

"She has had multiple tours of duty at the commission and has always been a fierce advocate for agency staff and for protecting consumers," said Kaufman, who spent nearly 25 years at the FTC. "Her emphasis on the agency's proper assertion of its legal authority and focus on some recent overreaches by the agency has highlighted important administrative and procedural issues."

Among the issues Wilson pointed to in her op-ed on Tuesday was a statement the FTC issued in November outlining an expansive new approach to enforcing against "unfair methods of competition" under Section 5 of the FTC Act, guidance that replaced an Obama-era version that tied the authority to the same analytical tools used with the primary antitrust laws.

She said the policy statement ignores decades of court rulings and condemns any business conduct that the commission's majority finds "distasteful."

"The new policy adopts an 'I know it when I see it' approach," Wilson said. "But due process demands that the lines between lawful and unlawful conduct be clearly drawn, to guide businesses before they face a lawsuit."

Wilson also said changes to the commission's merger review process "impose a tax on all mergers" and noted that progressives tried to pass legislation that would have banned or restricted mergers but failed.

"Ms. Khan now does so by fiat," Wilson said Tuesday. "Abuse of regulatory authority now substitutes for unfulfilled legislative desires."

Before serving as a commissioner, Wilson was the senior vice president for regulatory and international affairs at Delta Airlines Inc. after previously working in the antitrust practice groups of Kirkland & Ellis LLP and O'Melveny & Myers LLP.

She also served as chief of staff to FTC Chairman Tim Muris during the George W. Bush administration.

In Tuesday's op-ed, Wilson said that as an antitrust lawyer she counseled clients to "make a noisy exit" if they are ever at a trade association meeting and discussions among competitors start raising alarm bells about price fixing or other illegal activity, so that others in attendance remember that they objected and left.

"Although serving as an FTC commissioner has been the highest honor of my professional career, I must follow my own advice and resign in the face of continuing lawlessness," Wilson said. "Consider this my noisy exit."

Tony DiResta, co-chair of Holland & Knight's consumer protection defense and compliance team, and a former director of the FTC's Southeast Regional office, said Tuesday that while the practical implications of Wilson's departure are minimal, it's rare for a minority commissioner to resign and openly criticize the behavior of the majority.

"This event could create interest from Congress, who funds the FTC, to investigate the matter," DiResta said. "It could also provide arguments to defense counsel in pending investigations, to support the argument that the FTC is abusing its power in certain circumstances."

The U.S. Chamber of Commerce issued a statement Tuesday from the group's executive vice president and chief policy officer, Neil Bradley, calling Wilson a "voice of reason" at an agency often dominated by ideological agendas.

"It is deeply unfortunate that the actions of her fellow commissioners have deprived her of the ability to do her job and faithfully enforce the rule of law," Bradley said. "Her resignation letter makes clear that the Federal Trade Commission is in dire need of oversight."

--Editing by Marygrace Anderson.