

Commissioner Phillips on Early Termination and the Imposition of Costs to Discourage Deals

Bryan Koenig, [FTC's Noah Phillips Reflects on Tenure At Changing Agency](#), Competition Law 360 (Sept. 23, 2021) (excerpt)

Commissioner Phillips is an FTC commissioner nominated by President Trump and unanimously confirmed by the Senate on April 26, 2018. Before coming to the FTC, Phillips served as Chief Counsel to U.S. Sen. John Cornyn, of Texas, on the Senate Judiciary Committee. Phillips, who has been a commissioner for four and half years, announced his plans to depart the Commission something this fall. This is a portion of an interview published by Competition Law 360.

Should we be writing the obituary for Hart-Scott-Rodino Act early termination?

(Laughs) No, you're late, late to write the obituary. Let me say the following: You asked earlier about whether the FTC has a transparency problem. One of the things that I really don't like and about which I've been very critical publicly is that I think that one of the tactics we are using when it comes to merger control is deliberately creating uncertainty and a lack of clarity by some of the policy moves that we are making.

So one example of that, we said we were just evaluating early termination. And I don't think there's any reasonable prospect that it will return. And I don't think there's any reason for it not to return. Because you're talking about matters that everyone agrees have no plausible competitive problem. So why you would want to inhibit the market from working in that way is totally lost on me other than to create friction.

Another example, which I think is more problematic with respect to the clarity issue, because even if you don't get early termination, the clock does run anyway, is the letters we've been writing. Where we don't close investigations. We just sort of say 'close at your own risk.' And where we're still doing a real investigation, that's fine. We used to issue letters like that from time to time, and I have no problem with that. But where what we're doing is simply declining to give parties some level of certainty, in order just to create uncertainty and thus raise costs without real enforcement or investigation associated with it, that I have a real problem with.