



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

**Statement of Chair Lina M. Khan
on Issuance of the Commission Statement
Regarding the Criminal Referral and Partnership Process
Commission File No. P094207**

November 18, 2021

Today we are considering whether to adopt a Commission statement that would redouble our commitment to making criminal referrals whenever we identify criminal antitrust or consumer protection violations. The policy statement highlights recent referrals by the Commission that have resulted in criminal law enforcement and identifies best practices for assessing possible criminal activity uncovered during investigations, referring it promptly to the appropriate law enforcers, and maximizing the success of this work going forward. In particular, the policy statement commits us to pursuing cross-agency efforts; to strengthening our partnerships with federal, state, and local criminal law enforcement; and to publishing regular reports with data on the number of referrals we are making and the nature of the alleged conduct. I'd like to thank in particular Commissioner Slaughter and her team for their initiative and enthusiasm around this effort and this policy statement and their diligent work to drive it forward.

I'll note briefly three issues that are of particular interest to me in this area of our work.

First, I am especially interested in the Commission's efforts to coordinate with criminal authorities around wrongdoing by major corporations. Large firms have already been the subject of both civil enforcement by the FTC and separate criminal enforcement efforts in a host of matters, including *Uber*, *MoneyGram*, *Western Union*, *Reckitt Benckiser*, and *Bristol-Myers Squibb*.¹ Given research suggesting that larger firms are more likely than smaller firms to be repeat offenders, and the fact that crimes by larger firms will often cause greater harm given their bigger scale, focusing our enforcement and criminal referral efforts on crime by the largest and most sophisticated corporations is likely to be a wise use of Commission resources.²

Second, both civil and criminal enforcers must confront critical questions around achieving deterrence. Research shows that corporate actors can treat even seemingly high

¹ Fed. Trade Comm'n, Commission Statement on its Criminal Referral and Partnership Process, 2, 5-6 (Nov. 18, 2021) [hereafter "Commission Statement"].

² See, e.g., BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS, at 165-68 (2014) (finding a high rate of recidivism among large public corporations and numerous instances in which large firms violated the law repeatedly even after receiving deferred prosecution agreements); Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, U of Penn, Inst for Law & Econ Research Paper No. 20-13, 36-43 (2021) (examining recidivism by all publicly traded corporations over the last two decades and finding that "smaller public companies are subject to more burdensome fines than their larger public company counterparts, and they are also less likely to offend again," whereas "larger public companies are more likely to receive a relatively small fine, and more likely to offend again, than smaller firms."); Rick Claypool, *Soft on Corporate Crime*, PUB. CITIZEN (Sept. 29, 2019) (finding that "out of the 38 repeat offender corporations identified, 36 are major corporations that are on or have appeared on the Forbes Global 2000 list of the world's largest publicly traded corporations," with three having held the top slot as the largest firm in the world).

penalties as a cost of doing business,³ and the stock market price of defendant corporations generally rise in response to the announcement of a fine – suggesting that underenforcement and a lack of deterrence may be pervasive.⁴ Individuals, by contrast, are generally more risk averse, and empirical research suggests they are easier to deter.⁵ Pursuing individual liability in instances where top executives are responsible for or direct unlawful conduct is critical.⁶

Lastly, it’s important that *all* evidence of criminal activity be appropriately referred, including instances where corporations have lied to or hid material information from FTC staff. Firms have been indicted for making false statements to the FTC or hiding material information from us on at least two past occasions.⁷ Continued vigilance in this area is essential.

Redoubling our commitment and improving our processes to expeditiously refer criminal behavior to criminal authorities should promote accountability and deterrence, ensuring that Americans are better protected from unlawful conduct and corporate crime.

³ JOHN C. COFFEE, JR., CORPORATE CRIME & PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT, at xi (2020). (“[C]orporations are hard to deter; they can (and do) absorb enormous penalties as a cost of doing business.”).

⁴ *Id.* at 65-66 (noting that the positive market response to a fine suggests “that the actual penalty was less severe than the market had expected” and “if an informed market expects a harsher penalty, that suggests underenforcement is a pervasive pattern”). *See also* Lund & Sarin, *supra* note 2, at 45 (“Even as fines have increased, our data indicate that corporate crime has increased, too.”).

⁵ *Id.* at xi.

⁶ Memorandum from Commissioner Rohit Chopra to Commission Staff and Commissioners Regarding Repeat Offenders (May 14, 2018), <https://www.ftc.gov/public-statements/2018/05/commissioners-memorandum-2018-01-repeat-offenders> (“publicly held and private equity-owned corporations may engage in risky business practices to demonstrate to investors and capital markets that they are meeting or surpassing expectations for earnings and growth.”). *See also* Statement by Commissioner Chopra and Slaughter, In the Matter of Musical.ly (now known as TikTok), Comm’n File No. 172-3004 (Feb. 17, 2019), <https://www.ftc.gov/public-statements/2019/02/statement-commissioner-chopra-commissioner-slaughter-matter-musically-inc>; Lund & Sarin, *supra* note 2, at 47-49 (identifying several proposals that would better enable enforcers to pursue criminal charges against top executives rather than low-level offenders).

⁷ Commission Statement, at 2, 5.