

FTC Policy Statement Outlines Criminal Antitrust Enforcement Efforts, Reinforces Interagency Priorities

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On November 18, 2021, the Federal Trade Commission (FTC) voted 4-0 to adopt a [new policy statement](#) outlining the commission's plans to expand its criminal referral program in an effort to prevent and deter corporate crime stemming from consumer protection and criminal antitrust misconduct. The statement reaffirms the FTC's commitment to referring criminal conduct uncovered during its investigations to the appropriate authorities, but ultimately does not contain any major initiatives beyond increasing cross-agency collaboration and transparency regarding the FTC's criminal referral efforts.

A referral for criminal fraud can arise from the same conduct the FTC investigates under its civil consumer protection authority, or for conduct ancillary to an investigation, such as a referral for prosecution of false statements or of unrelated criminal activity uncovered in a conduct or merger investigation. The FTC's statement highlights its efforts in investigating consumer protection misconduct and references recent antitrust successes generated by its criminal referral program, and then sets forth four actions the commission is taking to further improve the criminal referral program going forward. First, the FTC plans to continue supporting cross-agency efforts and enhancing "best efforts" to ensure that criminal law violations uncovered by the FTC are promptly referred to the appropriate criminal authorities. Second, the FTC will host regular meetings with criminal authorities around the U.S. to advance collaboration and identify additional "best practices" to further execute such collaboration. Third, the FTC will offer trainings for law enforcement officials on how to use its Consumer Sentinel database, which aggregates millions of consumer complaints about potential violations of law from more than 45 different platforms, including but not limited to the FTC's own online reporting tool, other federal agencies and 25 state databases. Finally, and most importantly, the FTC explained that it would resume disclosing its criminal referral efforts by releasing regular public reports detailing, among other things, the number of referrals made, the nature of the alleged misconduct and, when possible, specifics regarding any criminal enforcement actions that result from the commission's activities.

FTC Chair's Statement Identifies Specific Criminal Enforcement Priorities

Taken together, the new initiatives announced in the policy statement do not signify a major shift in the FTC's criminal referral efforts, but FTC Chair Lina Khan, in a [statement on the issuance of the new policy statement](#), outlined three specific issues she plans to pursue in connection with the commission's efforts. First, she intends to focus on coordination with criminal authorities in connection with wrongdoing by major corporations in light of (i) research indicating that larger firms are more likely to be repeat offenders and (ii) the fact that crimes by larger companies are more likely to cause greater harm given their larger size.

Second, Chair Khan questioned the deterrence effect of only pursuing penalties against corporations involved in misconduct, citing research that suggests that (i) corporations treat seemingly high financial penalties as a cost of doing business, and (ii) the stock prices of defendant corporations generally rise in response to public disclosure of a fine. She suggested that authorities' pursuit of individual prosecutions of leading executives involved in corporate misconduct would be critical.

Finally, Chair Khan emphasized the importance of the commission referring all evidence of criminal activity identified during and FTC investigation, including situations where corporations misrepresent or conceal material information from FTC staff, which, as Chair Khan noted, had recently resulted in criminal indictments in at least

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two instances. Although the FTC policy statement itself did not announce any major policy shifts, Chair Khan's statement suggests that, under her leadership, the commission will not only prioritize criminal referrals, but also reevaluate how to most effectively deter future corporate crime.

Conclusion

While FTC and the Department of Justice have different capabilities to investigate corporate crime, recent statements by their leadership make clear that both agencies will continue to

prioritize corporate criminal enforcement and reassess how to prevent recidivism and promote deterrence most effectively. Given these recent statements, we expect both agencies to focus on identifying potential criminal misconduct during corporate antitrust investigations over the coming months, even when the investigations initially relate to potential civil misconduct.