

White Collar, Government & Internal Investigations / Antitrust ADVISORY

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Preservation Obligations for Ephemeral Messaging Will Not Disappear

On Friday, January 26, the Department of Justice (DOJ) Antitrust Division and Federal Trade Commission (FTC) announced that the agencies are updating guidance to reinforce parties' preservation obligations for "collaboration tools and ephemeral messaging platforms in the modern workplace." The agencies announced in a [press release](#) that updated language will appear "in their standard preservation letters and [specifications for all second requests](#)" (the method through which the FTC issues significant and document-intensive requests for additional information during antitrust merger investigations), as well as "voluntary access letters, and compulsory legal process, including grand jury subpoenas." According to the agencies, the updates are intended to "reinforce longstanding obligations" to preserve all means of companies' communications, including "new methods of collaboration and information sharing tools" during government investigations and litigation.

Recognizing that companies are continually adopting new technologies in the workplace to collaborate and communicate—"such as Slack, Microsoft Teams, and Signal"—the agencies warned that documents and communications created via these platforms have "long been covered by FTC and DOJ document requests," but that companies have failed to properly retain them during government investigations and litigation. The agencies specifically called out "tools that allow for messages to disappear via ephemeral messaging capabilities" and warned that failure to properly preserve these documents can—and has—resulted in civil spoliation sanctions and may result in criminal prosecution moving forward.

In a separate [press release](#), the FTC warned that its revised second request language "makes crystal clear that both ephemeral and non-ephemeral communications through messaging applications are documents" and that companies must take "appropriate steps to retain relevant documents," including by turning off automatic deletion for ephemeral messaging applications and "even stopping use of certain applications altogether." Refusing to mince words, the FTC cautioned that companies that fail to preserve such documents "may be breaking the law and subject to sanctions."

While the recent announcement underscores the agencies' focus on companies' preservation obligations for such documents and messages, this is not the first warning companies have received. In a [memorandum](#) issued by Deputy Attorney General Lisa Monaco in September 2022 (the "September 2022 [Monaco Memo](#)"), the DOJ

further updated its corporate criminal enforcement policies and warned that a company's policies for "the use of personal devices and third-party messaging platforms," including the use of ephemeral and encrypted messaging applications, should be considered by prosecutors when evaluating whether a company has implemented an effective compliance program. The September 2022 Monaco Memo (covered in more detail [here](#)) also instructed prosecutors to consider whether a corporation seeking cooperation credit in connection with an investigation has effective policies to enable the collection of all "work-related communications," including texts, e-messages, chats, and other data contained on mobile devices used by employees for business purposes.

As alluded to in the September 2022 Monaco Memo, in March 2023, the DOJ revised its policy on the [Evaluation of Corporate Compliance Programs](#) (ECCP). (See our prior coverage [here](#).) The March ECCP expanded DOJ guidance on several areas, including personal devices, communications platforms, and messaging applications. Specifically, the ECCP provided that:

- Prosecutors should consider a corporation's policies and procedures governing the use of personal devices, communications platforms, and messaging applications, including ephemeral messaging applications.
- Policies governing such applications should be tailored to the corporation's risk profile and specific business needs and ensure that, as appropriate and to the greatest extent possible, business-related electronic data and communications are accessible and amenable to preservation by the company.
- Prosecutors should consider how the policies and procedures have been communicated to employees, and whether the corporation has enforced the policies and procedures on a regular and consistent basis in practice.

While companies may be concerned with the added compliance costs of incorporating policies and procedures to govern the use of employees' personal devices—including the ability to preserve and collect documents and messages created on ephemeral messaging applications—the enforcers' updated guidance should not be ignored. There have been numerous examples of corporations facing severe penalties and sanctions for ignoring the enforcers' prior warnings. Indeed, just last year, a U.S. district judge sanctioned Google for failing to preserve evidence in its Android App Store litigation. The judge castigated Google for its default policy to delete internal chats after 24 hours and bemoaned Google's "don't ask, don't tell" policy for Chat preservation." Google is also facing a sanctions bid by the DOJ for its alleged automatic deletion of employee chats in the department's AdTech antitrust case.

The use of personal devices to conduct business, and failure to preserve communications on those devices, has landed other firms in hot water as well. On September 27, 2023, the SEC and Commodity Futures Trading Commission separately announced charges against an array of Wall Street firms for failing to preserve electronic communications as required by federal law. The firms collectively agreed to pay about [\\$1.8 billion in civil penalties](#) to resolve allegations that they allowed their traders to conduct business using third-party messaging platforms on their mobile devices. The SEC also announced enforcement actions against five broker-dealers for failing to preserve electronic communications that resulted in each respondent [paying between \\$2.5 million to \\$35 million](#) and agreeing to numerous remedial actions.

The antitrust enforcers' heightened focus on companies' preservation obligations for collaboration tools and ephemeral messaging applications is here to stay. Companies should make sure their messages are too.

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