



Antitrust Enforcement Agencies Continue Focus on Corporate Use of Third-Party Communication Apps

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On Friday, January 26, 2024, the Justice Department (DOJ) and Federal Trade Commission (FTC) announced that both agencies will update their document preservation letters, second requests, voluntary access letters, and compulsory legal processes to address the rising use of collaboration tools and ephemeral messaging applications. Ephemeral messaging applications are communication services that automatically erase communications between parties after they are sent, such as Signal, Telegram, and WhatsApp.

While this announcement may seem unremarkable, it has the potential to significantly affect evidence analyzed by DOJ/FTC in antitrust investigations. Although documents and data from third-party messaging applications are typically included in DOJ and FTC document requests, until now companies were not explicitly required to preserve these data. The DOJ/FTC announcement now makes failure to preserve these data subject to penalties, including obstruction of justice charges.

These updates follow a series of increased efforts by federal enforcement agencies to require companies to preserve data from third-party messaging applications used to conduct company business. As described in Van Ness Feldman's November 2022 alert, *Mitigating the Rising Risk from Corporate Use of Third-Party Apps*, in September of 2022, DOJ announced a revised set of Corporate Criminal Enforcement Policies which consider a company's data preservation policies related to third-party messaging applications. That same month, the Securities and Exchange Commission, announced \$1.1 billion in combined civil penalties against fifteen broker-dealers and one affiliated investment adviser for "widespread and longstanding failures by the firms and their employees to maintain and preserve electronic communications."

The takeaway is that companies must have policies to preserve data from third-party messaging applications, including data from ephemeral messaging applications. DOJ and FTC expect that companies and individuals engaged in investigations or litigation "will preserve and produce any and all responsive documents, including data from ephemeral messaging applications designed to hide evidence."

For More Information

Van Ness Feldman's Litigation and Investigations team provides strategic counsel to corporations on best practices and policies to mitigate risk in the face of evolving federal regulations. For more information on how you can ensure your company is complying with various requirements to preserve messages and data generated through the use of third-party messenger apps, please contact [Mike Farber](#), [Justin Panitchpakdi](#), or any other member of our [Litigation and Investigations](#) team.

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