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# A Closer Look At Antitrust Agencies' Chat Platforms Guidance

**Law360** on **April 10, 2024**

The Federal Trade Commission's Bureau of Competition and the U.S. Department of Justice Antitrust Division earlier this year released a joint statement reiterating document preservation obligations for companies and individuals that are the subject of government investigations or pending claims, highlighting ephemeral messaging platforms, such as Slack and Google Chats, that automatically delete communications, sometimes by default.[1]

Both agencies **announced updated language** used in their standard preservation letters, specifications for "second requests" used in premerger review under the Hart-Scott-Rodino Act, voluntary access letters and grand jury subpoenas, to address instant messaging platforms.

The agencies emphasize that companies' obligations to preserve information on such platforms are not new, explaining the clarification is to ensure that companies take the appropriate steps to preserve such communications after preservation obligations are triggered.

The revised language makes crystal clear that, in the agencies' view, ephemeral and nonephemeral communications through messaging applications are documents and that companies' preservation obligations extend to these communications.

For example, the FTC's standard HSR second request now defines messaging applications to include "platforms, whether for ephemeral or non-ephemeral messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (e.g., Microsoft Teams, Slack)."

Recent court decisions have found companies that fail to preserve text messages and ephemeral communications had spoliated evidence. In October 2023, for example, Google was sanctioned in the U.S. District Court for the Northern District of California's In re: Google Play Store Antitrust Litigation for failure to preserve Google Chat messages after litigation began.[2]

The FTC warns that it may pursue civil enforcement actions or make referrals for criminal prosecution through the FTC's Bureau of Competition's Criminal Liaison Unit should companies fail to take appropriate steps to preserve these communications.

The agencies' statement follows the DOJ's updates to its evaluation of corporate compliance programs guidance for assessing how companies govern employees' use of personal devices and communication platforms, including ephemeral messaging applications.[3]

The guidance lists specific factors that prosecutors should consider when investigating corporations, determining whether to bring charges or negotiating plea agreements.

Under the guidance, the DOJ will consider whether and to what degree messaging applications, including ephemeral messaging applications, "impaired in any way the organization's compliance program or its ability to conduct internal investigations or respond to requests from prosecutors or civil enforcement or regulatory agencies."

While the precise standard varies by jurisdiction, generally, potential litigants must preserve relevant documents and other tangible evidence when the party has notice that the evidence is relevant to litigation, or a party should have known that the evidence may be relevant to future litigation.[4]

There is no general duty to preserve evidence before litigation is filed, threatened or reasonably foreseeable, unless the duty is voluntarily assumed or imposed by a statute, regulation or another special circumstance.[5]

According to the Sedona Conference, Commentary on Legal Holds, the standard is objective.[6] If a reasonable person would have expected litigation, a party's duty to preserve generally is triggered.[7]

Once triggered, a party is "responsible for taking reasonable and proportionate steps to preserve relevant and discoverable" evidence, the Sedona Conference says.[8]

Innovative messaging technologies can present challenges for collecting communications and company documents generated and/or transmitted via platforms that utilize auto-erase functions.

In the FTC Bureau of Competition Director Henry Liu's words, the "update reinforces that … preservation responsibility applies to new methods of collaboration and information sharing tools, even including tools that allow for messages to disappear via ephemeral messaging capabilities."

Companies should heed this warning and take appropriate steps to ensure efficient and effective implementation of litigation holds when preservation obligations are triggered.

**Practice Tips**

***Know the communication platforms that employees use.***

Most companies offer employees a range of collaboration tools. Usually, these programs are vetted and familiar to in-house IT departments.

However, if employees regularly use alternative, nonapproved technologies to collaborate or conduct business activities, companies may face additional challenges to ensure such communications are preserved when obligations arise.

***Understand the defaults.***

Ephemeral messaging platforms have a range of settings, in some instances allowing messages to auto-delete as soon as they are read.

Companies should know what the current settings are for any communication platform that its employees utilize and how those settings can be adjusted if preservation obligations
arise.

***Stay in control.***

When preservation obligations are triggered, it is the company's duty to ensure documents and communications are preserved.

Therefore, where possible, companies should maintain control over retention settings rather than allow employees themselves to adjust the settings.

**Conclusion**

Employees — and executives, for that matter — commonly view ephemeral chats as "off the record" conversations and may speak with greater candor than through other communication mediums.

This is not lost on the agencies. Companies should expect that ephemeral messages will continue to be implicated in investigations, particularly merger investigations where the motivation behind a deal is critical.

Having a clear understanding of how the collaboration and messaging platforms their employees use operate and the necessary steps to preserve information on these systems will save companies from unnecessary headaches and discovery compliance consequences when preservation obligations arise.

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[1] https://www.ftc.gov/enforcement/competition-matters/2024/01/slack-google-chatsother-collaborative-messaging-platforms-have-always-been-will-continue-be-subject

[2] In re: Google Play Store Antitrust Litiga., No. 21-md-02981-JD (N.D. Cal.).

[3] https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl.

[4] E.g. Fujitsu Ltd. v. Fed. Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001).

[5] Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 521 (D. Md. 2010), aff'd in part, modified in part, 2010 WL 11747756 (D. Md. 2010). Cf. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("It goes without saying that a party can only be sanctioned for destroying evidence if it had a duty to preserve it.").

[6] See The Sedona Conference, Commentary on Legal Holds, Second Ed.: The Trigger & The Process, 20 Sedona Conf. J. 341, 354 (2019).

[7] Id.

[8] Id. at 356.

[9] https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-doj-updateguidance-reinforces-parties-preservation-obligations-collaboration-tools-ephemeral

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