

Joint DOJ/FTC Announcement Signals an Aggressive Approach in the Government's Battle to Capture Off-Channel Communications¹

By Daniel Cady Davidson

Earlier this year, the Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) jointly announced updated language in the agencies’ documents requests (such as preservation letters and grand jury subpoenas) “to address the increased use of collaboration tools and ephemeral messaging platforms in the modern workplace.”² While the updated language itself may appear unextraordinary on its face, the announcement deserves the attention of all corporate counsel, both in-house and external advisors. That is because DOJ, in making the announcement, raised the specter of criminal obstruction of justice charges if companies fail to preserve and produce ephemeral messages and similar data. In doing so, the government has signaled its intention to significantly raise the stakes in disputes with companies over off-channel communications.

The DOJ/FTC Announcement

An FTC model request for documents, available online, reveals what the updated language around ephemeral communications and collaborative tools looks like. The model request’s definition of “document” includes all communications sent through “Messaging Applications” and all “documents contained in Collaborative Work Environments”³ “Messaging Application” is in turn defined to include “platforms, whether for ephemeral or non-ephemeral

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² <https://www.justice.gov/opa/pr/justice-department-and-ftc-update-guidance-reinforces-parties-preservation-obligations>

³ https://www.ftc.gov/system/files/ftc_gov/pdf/Final-Rev-Model-Second-Request-01-26-2024.pdf at 14 ¶ D 6.

messaging, for email, chats, instant messages, text messages, and other methods of group and individual communication (e.g., Microsoft Teams, Slack)” and “may overlap with” the definition of “Collaborative Work Environment.”⁴ “Collaborative Work Environment” is defined as “a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices.” Examples include Microsoft SharePoint.⁵

The DOJ/FTC announcement states the government’s view that this updated language does not create new requirements for recipients of document requests, but instead “reinforce[s] longstanding obligations[.]” Most strikingly, Deputy Assistant Attorney General Manish Kumar of DOJ’s Antitrust Division is quoted in the announcement as saying: “Failure to produce such documents may result in obstruction of justice charges.”

Government regulators and prosecutors have increasingly focused on collaboration tools and ephemeral messaging during the past few years. But this announcement, by raising the prospect of criminal obstruction charges, signals that the government may soon be moving far beyond the civil monetary penalties that have characterized enforcement efforts to date.

The Communications at Issue

In analyzing the DOJ/FTC announcement, it is helpful to distinguish several different categories of communications and data. “Off-channel communications” are “business-related messages sent and received through applications on personal devices or through other platforms outside of the [business’s] control, including using personal email, chats, or text-messaging applications[.]”⁶ These communications are of concern to government authorities because they

⁴ *Id.* at ¶ D 9.

⁵ *Id.* at ¶ D 4.

⁶ <https://www.finra.org/sites/default/files/2024-01/2024-annual-regulatory-oversight-report.pdf> at 87 n.1

may not be captured by records requests to the companies themselves. These communications should also be of concern to companies' counsel because, in certain contexts, the law requires they be retained. Securities and Exchange Commission ("SEC") Rule 17a-4, for example, requires retention of all business communications—whether “on-” or “off-channel.”

“Ephemeral” messaging applications delete messages a certain time after they are read, sometimes instantaneously.⁷ While some apps, like Whatsapp and Signal, have become known for possessing this feature, even the default messaging application on an iPhone can be set to auto-delete messages and effectively become an ephemeral messaging app. The concepts of off-channel and ephemeral communications often intersect. For example, a company's employees may communicate with each other on their personal cell phones via Whatsapp, creating a scenario in which the company does not capture the communications in its own records and the communications auto-delete from the employees' personal devices.

Collaboration tools are applications which feature an array of means through which employees can interface, such as co-editing documents or instant messaging one another. Once again, collaboration tools can intersect with the concepts of off-channel communications and ephemeral messaging—if, for example, a company does not proactively preserve employees' communications which occur via the tool.

The Regulatory Enforcement Landscape

During the past few years, regulators began aggressively pursuing financial institutions that failed to abide by recordkeeping requirements, such as SEC Rule 17a-4. In 2021, public reporting revealed that SEC enforcement staff were contacting financial institutions with inquiries into their documentation of employees' work-related communications, particularly on

⁷ <https://www.fticonsulting.com/insights/articles/employees-talking-business-personal-devices>

personal devices.⁸ Later that year, J.P. Morgan Securities LLC settled with the SEC and the Commodity Futures Trading Commission (“CFTC”) and agreed to pay a combined \$200 million in penalties. The company admitted that its employees often communicated about work on personal devices and through personal accounts, and the company did not preserve those communications. The SEC, CFTC, and Financial Industry Regulatory Authority (“FINRA”) have since issued billions of dollars in fines to a laundry list of financial institutions over recordkeeping violations involving off-channel communications.⁹ Over 50 financial services entities have entered into settlement agreements with regulators since 2021. These financial institutions are legally required to capture and retain communications related to their business. The COVID-19 pandemic posed new compliance challenges. With more people working from home, formalities around business communications sometimes broke down, with employees turning more often to their personal devices to communicate about work. Further, meeting platforms like Zoom and Webex, and collaboration tools like Teams and Slack—all of which include instant messaging features—became ubiquitous.

Recent settlements by the SEC with sixteen financial firms are representative of the new enforcement trend. On February 9, 2024, the SEC announced that a group of broker dealers and investment advisors agreed to pay combined civil penalties of more than \$81 million over violations of the federal securities law’s recordkeeping provisions.¹⁰ The facts underpinning these settlements appear generally similar to prior settlements reached by the SEC and CFTC. The firms admitted that their employees communicated about business matters in various ways

⁸ <https://www.reuters.com/legal/litigation/exclusive-us-sec-opens-inquiry-into-wall-street-banks-staff-communications-2021-10-12/>

⁹ <https://news.bloomberglaw.com/us-law-week/new-finra-guidance-reflects-focus-on-off-channel-communications>

¹⁰ https://www.sec.gov/news/press-release/2024-18?utm_source=securitiesdocket.beehiiv.com&utm_medium=newsletter&utm_campaign=sec-charges-16-firms-for-recordkeeping-failures-related-to-off-channel-communications

that skirted recordkeeping requirements, such as through personal text messages. In other words, the employees communicated off-channel. The firms admitted these failures occurred at all levels of authority, including supervisory. The firms agreed, in addition to paying monetary penalties, to retain independent compliance consultants to review their policies and procedures regarding retention of electronic communications, including on employees' personal devices.

This enforcement trend shows no signs of slowing. On April 3, 2024, the SEC announced a \$6.5 million settlement with another investment advisor over, among other things, failure to preserve off-channel communications.¹¹ The SEC's order in that matter observed, as an example, that "three senior employees engaged in [business] discussions on personal devices set to automatically delete messages after 30 days."¹²

Ramifications of the DOJ/FTC Announcement

The DOJ/FTC announcement portends a new frontier in government enforcement: criminal obstruction of justice charges. The announcement took a notably aggressive tone, stating that the updates to document request language "will ensure that neither opposing counsel nor their clients can feign ignorance when their clients or companies choose to conduct business through ephemeral messages."

Further, the announcement characterized ephemeral messaging applications as "designed to hide evidence." That may not be a fair view—for example, there may be legitimate business purposes for ephemeral messaging, such as protecting sensitive client data—but it appears the government may be inherently suspicious of ephemeral messaging apps. Most concerning for corporate counsel, the announcement warned that failure to produce data from ephemeral messaging apps and/or collaboration tools "may result in obstruction of justice charges."

¹¹ <https://www.sec.gov/news/press-release/2024-44>

¹² <https://www.sec.gov/files/litigation/admin/2024/ia-6581.pdf> at ¶ 3.

Given the stakes, it is critical that companies' counsel take note of the DOJ/FTC announcement and proactively address issues involving off-channel communications, ephemeral messaging, and collaboration tools. Counsel must understand how employees are communicating; educate employees on appropriate communications channels; and ensure the company's policies and procedures will enable the company to fully respond to future document requests from the government, which will leave no doubt that ephemeral messaging and collaboration tools are encompassed by the request.

Counsel should not, when approaching data retention and document productions to the government, treat certain types of messaging or communication as less important than the ubiquitous email. While at one point it may have been reasonable to assume that employees drew distinctions between business communications over channels such as email and personal communications over mediums such as text messaging, that is no longer the case. Indeed, during a recent federal antitrust trial, U.S. District Judge James Donato personally rebuked Google's Chief Legal Officer Kent Walker when Walker explained that Google's retention policies for emails were different than those for chats. Walker's explanation was that email was typically used for business whereas chat was usually used for "transitory" communications. Judge Donato observed that the record in that case showed chats were regularly used by employees for business purposes, and so he roundly rejected that distinction.¹³

Counsel should consider whether ephemeral messaging serves a legitimate business purpose. There may come a time when that explanation needs to be provided to the government in an effort to combat the pre-conceived perception that such apps' only usefulness is in auto-deleting evidence. When responding to the government's document requests by, for example,

¹³ <https://www.law360.com/pulse/articles/1767671/google-s-clo-gets-earful-from-judge-over-deleted-chats>

issuing litigation holds, counsel should disable any auto-delete functionality the company's various communications mediums might possess. In the Google litigation, Judge Donato also criticized Google for failing to take such steps despite the record reflecting that it was technically feasible for the company to have done so.

Regulated businesses such as financial institutions, however, cannot wait to receive a document request from the government to disable any auto-delete functionality of communications tools their employees use to discuss business. These companies must affirmatively take steps to preserve all business-related communications, no matter their medium. The DOJ/FTC announcement signals that the potential consequences for failing to do so are, going forward, far graver than monetary penalties.