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PRESS RELEASE

Justice Department and the FTC Update Guidance that Reinforces Parties' Preservation Obligations for Collaboration Tools and Ephemeral Messaging

Friday, January 26, 2024

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For Immediate Release

Office of Public Affairs

The Justice Department's Antitrust Division and the Federal Trade Commission (FTC) today announced that both agencies are updating language in their standard preservation letters and specifications for all second requests, voluntary access letters and compulsory legal process, including grand jury subpoenas, to address the increased use of collaboration tools and ephemeral messaging platforms in the modern workplace. These updates reinforce longstanding obligations requiring companies to preserve materials during the pendency of government investigations and litigation.

"These updates to our legal process will ensure that neither opposing counsel nor their clients can feign ignorance when their clients or companies choose to conduct business through ephemeral messages," said Deputy Assistant Attorney General Manish Kumar of the Justice Department's Antitrust Division. "The Antitrust Division and the Federal Trade Commission expect that opposing counsel will preserve and produce any and all responsive documents, including data from ephemeral messaging applications designed to hide evidence. Failure to produce such documents may result in obstruction of justice charges."

"Companies and individuals have a legal responsibility to preserve documents when involved in government investigations or litigation in order to promote efficient and effective enforcement that protects the American public," said Director Henry Liu of the FTC Bureau of Competition. "Today's update reinforces that this 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 continue to adopt new technologies to do their work, and in recent years there has been an increase in use of collaboration tools and ephemeral messaging applications, such as Slack, Microsoft Teams and Signal. Some of these technologies allow, or even automatically enable, immediate and irretrievable destruction of communications and documents. Documents created through use of these technologies have long been covered by Justice Department and the FTC document requests. However, companies have not always properly retained these types of documents during government investigations and litigation.

Today's announcement underscores the continued cooperation between the Antitrust Division and FTC's Bureau of Competition on criminal enforcement of antitrust laws and related issues that arise in antitrust actions.

Updated January 26, 2024

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