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MIXED MESSAGES:
The Salt Typhoon Encryption Debacle

Marisa T. Darden, Robert J. Kolansky, Kennedy Dickson, and Navroop Mitter

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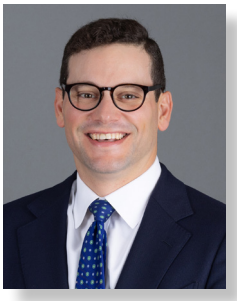
Marisa T. Darden is a partner and the chair of Benesch's White Collar, Government Investigations & Regulatory Compliance Practice Group. Marisa is a former state and federal prosecutor. Marisa has a distinguished career assisting clients across various industries. She actively advises companies and individuals in defense of civil and criminal investigations and prosecutions brought by law enforcement and regulatory agencies. Marisa has successfully tried more than 15 complex criminal cases to verdict and has argued before the Sixth Circuit Court of Appeals. Marisa clerked for the Honorable Morrison C. England in the Eastern District of California, and worked as an Assistant District Attorney in the New York County (Manhattan) District Attorney's Office.

Her extensive experience includes handling investigations related to the Foreign Corrupt Practices Act, bribery, corruption, the Racketeer Influenced and Corrupt Organizations Act, wire and mail fraud, and complex financial investigations. Marisa also conducts corporate inquiries into sexual harassment allegations, workplace discrimination, civil rights, and Title IX violations.



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Robert J. Kolansky is Of Counsel in Benesch's White Collar, Government Investigations & Regulatory Compliance Practice Group. He focuses his practice in the areas of white collar criminal defense, sensitive corporate investigations, regulatory compliance, and business litigation. A former federal and state prosecutor, Robert leverages his extensive government experience and relationships to the benefit of his clients.

Robert's clients include corporations and individuals facing federal and state government investigations involving allegations of corruption, economic crimes, fraud, including securities fraud, mail and wire fraud, bank fraud, money laundering, and RICO. He has advised and defended healthcare providers in connection with criminal fraud investigations and regulatory compliance, including federal grand jury investigations. He regularly conducts internal investigations for companies and has assisted clients in developing corporate compliance programs.

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Kennedy Dickson is an associate in Benesch's Litigation Practice Group. She focuses her practice on complex commercial litigation and white collar matters.

Before joining Benesch, Kennedy clerked for the Honorable J. Philip Calabrese of the U.S. District Court for the Northern District of Ohio. This experience provided her with invaluable insight into the federal judiciary as she observed and helped facilitate all aspects of the legal process from the perspective of the court.

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NAVROOP MITTER
CEO & Founder, ArmorText

Navroop Mitter is the visionary CEO and founder of ArmorText, a leader in secure out-of-band communications. With a deep understanding of the evolving cybersecurity landscape, Navroop accurately predicted the vulnerabilities in enterprise communications and the critical need for compliant, secure channels. Under his leadership, ArmorText has been recognized as a leader in The Forrester Wave™: Secure Communications Solutions, Q3 2024, and has become a category leader for out-of-band communications, particularly for incident response and security operations. Navroop's unique blend of patience, grit, and informed insight has driven ArmorText to outclass competitors, safeguarding critical infrastructure against sophisticated cyber threats. His strategic vision continues to shape the future of post-breach resilience, ensuring that organizations can effectively communicate during crises.

Navroop is a trusted advisor to senior leaders across industries, including C-suite executives, CISOs, and board members, and frequently collaborates with strategic partners and law firms to enhance corporate resilience. His work is a testament to his commitment to protecting enterprises and critical infrastructure from the growing onslaught of cyberattacks.

Update from Benesch's Litigation and White Collar, Government Investigations & Regulatory Compliance Practice Groups

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While the balance of security, privacy, and public safety has always been a concern, recent cyberattacks have highlighted conflicting guidance by United States government officials, creating potential pitfalls for businesses.

Recently, a series of cyberattacks attributed to an alleged Chinese-government-backed threat actor, Salt Typhoon, has highlighted vulnerabilities within major United States's communication networks. One of the hackers' targets appears to have been exploiting existing backdoors used by law enforcement in executing wire-tapping requests, which the Communications Assistance for Law Enforcement Act ("CALEA") has mandated for the last 30 years. Salt Typhoon accessed call logs, unencrypted texts, and audio communications of targeted individuals—including government officials and politicians. Telecommunications providers like AT&T and Verizon are still working to re-secure their networks.

In response to the attack, officials from the Federal Bureau of Investigation (FBI) and the Cybersecurity and Infrastructure Security Agency (CISA) are urging Americans to communicate via end-to-end encrypted messaging applications like WhatsApp, Signal, and FaceTime to minimize the risk of data breaches involving sensitive information.[1]

While these platforms offer better security through end-to-end encryption, which compared to traditional communication channels—like e-mail, SMS texting, and phone calls—lack, they were designed for consumer use, and they place control of ephemerality in the hands of the end users to determine how to apply automatic and timed message deletion features. These features can have the effect of incentivizing nefarious activity and result in data retention and preservation challenges. Additionally, consumer-first end-to-end encrypted communication platforms can impede an organization's ability to meet regulatory, statutory, or legal requirements to produce records when required.

Guidance from FBI and CISA is in tension with guidance and recent enforcement trends from other federal agencies. Earlier this year, Department of Justice and Federal Trade Commission made it clear that both agencies expect organizations to have compliance plans in place to retain ephemeral messaging application data.[2] An organization's failure to preserve and produce ephemeral

[1] *See* https://www.nbcnews.com/tech/security/us-officials-urge-americans-use-encrypted-apps-cyberattack-rcna182694; https://www.cisa.gov/sites/default/files/2024-12/guidance-mobile-communications-best-practices.pdf *(CISA's Mobile Communications Best Practice Guidance).*

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

messaging communications could result in civil spoliation sanctions and criminal obstruction charges.3 Additionally, prosecutors may consider employee personal device and messaging platform usage as part of their cooperation inquiry into the sufficiency of an organization's compliance program.

Other agencies have aggressively pursued monetary penalties for recordkeeping rule violations. In 2022, Securities Exchange Commission announced that it had enforced over $1 billion in penalties against various investment firms for their failure to retain electronic communications in compliance with securities laws.[4] Similarly, Commodity Futures Trading Commission has recently imposed over $710 million in penalties for recordkeeping and supervision failures related to use of "unapproved communication methods."[5]

In all, businesses should move to end-to-end encryption-based messaging channels to protect their confidential information and communications. In making this transition, however, businesses should be cognizant of their statutory, regulatory, and legal obligations, especially regarding ephemeral messaging preservation. Businesses should seek out enterprise-first end-to-end encrypted messaging applications with native capabilities for securely meeting records retention obligations, user management, and policy enforcement. While it may be possible to implement compensating controls for the deficiencies of consumer-first end-to-end encrypted messaging applications, the costs, both in time and dollars, of continuously ensuring these controls should be carefully considered. Ultimately, businesses should evaluate the types of messaging platforms employees use, the devices they use to communicate, the organization's current ephemeral messaging retention policies, and how employees are trained on those policies.

Benesch's White Collar, Government Investigations & Regulatory Compliance Group can perform a risk assessment of your business's current messaging practices and help you develop effective compliance policies. To read more on this topic, please refer to Benesch's recent client bulletin, Staying Ahead of the Curve: Adapting to Evolving Cyber Regulatory Enforcement.

[3] https://www.ftc.gov/system/files/documents/cases/order_granting_spoliation_sanctions.pdf

[4] https://www.sec.gov/newsroom/press-releases/2022-174; https://www.sec.gov/newsroom/press-releases/2024-98

[5] https://www.cftc.gov/PressRoom/PressReleases/8599-22