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DOJ Decision On "No Solicitation" Agreements Provides Guidance On Antitrust Violations In Recruiting

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On September 24, 2010, the Antitrust Division of the U.S. Department of Justice (DOJ) filed a lawsuit and proposed settlement in the U.S. District Court for the District of Columbia prohibiting six high-tech companies – Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc. and Pixar – from entering into "no solicitation" or "no cold call" agreements for a period of five years. The settlement must be approved by the court. The decision provides significant guidance on what is, and is not, an antitrust violation in the area of no solicitation agreements between companies.

According to the DOJ, the companies entered into a series of bilateral agreements and implemented internal policies banning the direct solicitation of skilled technical employees between the various companies. In certain agreements, the employees were placed on internal "Do Not Call" lists. The DOJ's theory of competitive harm was that the companies' concerted behavior disrupted the normal competition for highly skilled technical employees that might otherwise occur in the employment context. As a result, the DOJ claimed that these affected employees were deprived of competitively important information and access to better job opportunities.

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Violation Of Section 1 Of The Sherman Act Alleged

The DOJ alleged that the no solicitation agreements (five in total) were per se illegal naked restraints of trade because they essentially allocated the companies' employees, restricting the employees' ability to move freely between the six companies. Section 1 of the Sherman Act prohibits "[e]very contract, combination…or conspiracy, in the restraint of trade" and makes unlawful any agreements between competitors that "lack any redeeming virtue." The DOJ declared the defendants "competitors" in the hiring of skilled technical employees.

The DOJ's decision to challenge the no solicitation agreements likely stemmed from inferences it made from intercompany communications that the agreements were not reasonably related to any collaboration or joint venture activity between the companies, despite some extensive business relationships that existed between them. Each agreement applied broadly to all employees of the companies regardless of position and was not limited in any meaningful way by geography, job function, product group or time period. As a consequence, according to the DOJ, the agreements were not ancillary to a legitimate pro-competitive venture and were, therefore, deemed per se illegal.

Guidance For Agreements On Recruiting Policies

The DOJ's actions do not constitute a flat ban on agreements between competitors regarding solicitation of employees. On the contrary, the proposed settlement explicitly does not prohibit the defendants from including "no direct solicitation" provisions in agreements. In doing so, the proposed settlement provides significant guidance on when a no solicitation agreement between competing employers is unlikely to violate the antitrust laws. To be acceptable under the DOJ settlement, such an agreement must be contained within existing and future employment or severance agreements with a defendant's individual employees or be reasonably necessary for –

- mergers or acquisitions, investments or divestitures, including all related due diligence activities
- contracts with consulting services, outsourcing vendors, recruiting agencies and temporary or contracting agencies
- settlements of legal disputes
- contracts with resellers, OEMs and service providers
- legitimate joint ventures or collaboration agreements.

In particular, with respect to any agreements with a reseller or OEM, other type of service provider or recipient, or other legitimate collaboration agreement, the defendant must –

- specifically identify the agreement to which the no direct solicitation provision is related
- narrowly tailor the provision and limit it to those employees participating in the venture, including identifying them specifically to the extent possible

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- include a specific termination date or event, such termination date not unreasonably extending beyond the anticipated collaboration timeframe
- sign the agreement, as well as any subsequent modifications to it.

Accordingly, these four guidelines should help to protect an employer who, in the regular course of business, wants a no solicitation provision in such an agreement with a reseller or OEM. The DOJ-proposed settlement also does not proscribe a defendant's unilateral decision to adopt a policy not to consider or solicit employees from another company, but none of the defendants may request any other person or business adopt, enforce or maintain such a policy.

The DOJ's action against these companies represents a continued effort to challenge, under the antitrust laws, employment agreements without any procompetitive justification that may distort the competitive process. It also both highlights the inferential risk that can arise from communications between competitors and demonstrates the antitrust agencies' willingness to investigate. While the proposed settlement is limited to specific facts and circumstances, it, nonetheless, provides the business community with some minimum prophylactic guidance as to what should be included when engaging in a legitimate collaborative project with a competitor and seeking to implement these types of restrictions. Businesses considering such provisions should prospectively assess with antitrust counsel the necessity of such restrictions and carefully craft these agreements so as not to provoke antitrust scrutiny.