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Posted at 4:02 PM on October 25, 2010 by Sheppard Mullin

Silicon Valley Firms Settle DOJ Hiring Practices Charges, But Are No-Solicitation Agreements Per Se Illegal?

Ending an investigation launched more than a year ago, on September 24, 2010, the Antitrust Division of the Department of Justice entered into an agreement with Google Inc., Apple Inc., Intel Corp., Adobe Systems Inc., Intuit Inc. and Pixar Animation settling charges that the companies' bilateral agreements prohibiting cold-calling of their employees violated Section 1 of the Sherman Act. In a complaint also filed on September 24th, the Division alleges that the companies compete for highly skilled technical employees and that their concerted behavior "reduced their ability to compete for employees and disrupted normal price-setting mechanisms that apply in the labor setting." *U.S. v. Adobe Systems, Inc.*, Complaint, online. The Division contends the agreements are facially anticompetitive because "they eliminated a significant form of competition to attract high tech employees" and "substantially diminished competition to the detriment of high tech employees who were likely deprived of important information and access to better job opportunities."

In its complaint, the Division states that the no-cold call prohibitions included direct communications in the form of e-mail and other writings. Even though the companies receive a high number of applications from high tech employees, they still use cold calling to fill certain positions. The Division describes the companies as direct competitors for employees and contends the employment restraints are per se illegal under Section 1. The effect of the no-solicitation agreements, the Division alleges, was to reduce competition for high tech employees, diminish potential employment opportunities for these employees and "interfere with the proper functioning of the price-setting mechanism that would have otherwise prevailed." *U.S. v. Adobe Systems, Inc.*, Competitive Impact Statement, online.

To back-up this contention, the Division refers to "analogous" cases. One of these cases is a 1996 judgment of a federal district court approving an agreement between the Division and a physicians practice association that settled the Division's charges that agreements among members of a physicians association not to directly solicit medical students was designed to curb competition between residency programs and was per se illegal. *United States v. Ass'n of Family Practice Residency Doctors*, No. 96-575-CV-W-2, Complaint at 6 (W.D. Mo. May 28, 1996). The Division refers also to a Sixth Circuit decision holding that an agreement between two competitors not to actively solicit each other's customers was a customer allocation scheme and a per se violation of Section 1. *U.S. v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367 (6th Cir 1988). The Division relies as well on a Ninth Circuit decision holding that an agreement between

two competing companies to refrain from bidding on each other's former billboard leases was per se illegal. *United States v. Brown*, 936 F.2d 1042 (9th Cir. 1991).

The Division maintains that the agreements at issue in this instance are per se illegal because antitrust analysis of downstream, customer-related restraints is, the Division contends, "equally applicable to upstream monopsony restraints on employment opportunities." The Division further asserts that "[a]nticompetitive agreements in both input and output markets create allocation efficiencies. Hence naked restraints on cold calling customers, suppliers, or employees are similarly unlawful." Competitive Impact Statement, online.

The Division also notes that the alleged per se agreements were not justified as properly ancillary to any legitimate collaboration. Although the companies at times engaged in legitimate collaborative projects, the no-solicitation agreements were not tied to any such collaboration, nor were they narrowly tailored to the scope of any specific collaboration.

Several of the would-be defendants publicly expressed their disagreement with the Division's position that they violated the antitrust laws. Google's Associate General Counsel for Employment stated in an online post that Google believes its "no cold call" policies neither hindered hiring nor affected wages. *See* J. Tessler, Silicon Valley Companies Settle DOJ Hiring Inquiry, online (Sept. 27, 2010). Spokespersons for Intuit and Intel similarly stated that they do not believe their companies violated the law. An Adobe spokesperson indicated that Adobe may agree with this position. The spokesperson noted that Adobe settled with the Division to avoid the costs and distraction of litigation. *Id.*

By reaching a settlement immediately, there will be no judicial determination as to which side is correct. In addition, the terms of the settlement agreement go further than what the government alleged in its complaint. Although the government alleged that the defendants agreed to ban cold calling of employees, the settlement more broadly enjoins agreements regarding solicitation, recruitment and other methods of competing for employees. Companies in all sectors should therefore understand that agreements with competitors concerning inputs, just like those concerning outputs, may pose considerable antitrust risk.

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