

Client Alert

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Settlement Reached in Antitrust Challenge to High-Tech Employee Recruiting Practices

On Thursday, May 1, the Antitrust Division of the Department of Justice announced a settlement with eBay to resolve DOJ's challenge to the company's recruitment practices.

In the complaint, originally filed in 2012, DOJ alleged that eBay secretly agreed with Intuit not to recruit—and at certain times, hire—each other's employees. DOJ viewed the "no-poach" agreement, allegedly executed by senior-level executives, as a naked market allocation for high-tech employees. DOJ alleged that the agreement was a per se violation of the antitrust laws and without procompetitive benefit, and also claimed it resulted in lower pay and fewer employment opportunities for affected employees. The settlement prevents eBay from agreeing with other companies to restrict recruitment and hiring.

Intuit was not named in the DOJ lawsuit because Intuit had settled similar claims with DOJ in September 2010. The eBay settlement marks the last in a series of DOJ cases filed since 2010 challenging no-poach agreements among high-tech companies. Adobe, Apple, Google, Pixar and Lucasfilm also settled with DOJ. Until last week, eBay was the only company willing to litigate against DOJ.

In certain respects, the cases (and the conduct) may be unique to California, where non-compete agreements are void under state law. Still, DOJ's settlement is notable in a few respects.

- In his remarks announcing the settlement, Antitrust Division Assistant Attorney General Bill Baer stated that the related, private follow-on class actions serve as "examples of the important roles that the federal, state and private enforcers together play in protecting US consumers." These private class actions (filed against Google, Apple, Adobe and Intel) are reportedly settling for \$300 million and, at a minimum, serve as a reminder of the significant monetary risk associated with government antitrust enforcement actions.
- In addition, AAG Baer indicated that the "no-poach" cases are a reminder "that the antitrust laws apply to every industry, including companies that innovate and companies in the high-tech industry." They, and AAG Baer's remarks, also make clear that the high-tech sector remains a significant DOJ enforcement priority.
- eBay also agreed to pay \$3.75 million in restitution and civil penalties to settle the state of California's related lawsuit. Although not a large sum overall, \$300,000 will be paid for harm caused to California's economy, the first time the state has collected additional funds in an antitrust settlement explicitly for general harm to the economy. This will be a development to watch going forward.

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Hunton & Williams LLP has significant experience representing companies on merger and other antitrust matters before competition enforcement agencies. The firm's global competition practice combines high-level government and private litigation experience. Lawyers in the group come from both of the US antitrust enforcement agencies and include a former deputy director of the US Federal Trade Commission's Bureau of Competition, a former deputy assistant attorney general and chief of staff of the DOJ Antitrust Division, a former counsel and chief of staff of the DOJ Antitrust Division, four former FTC litigators and other attorneys from the FTC and DOJ. The group's litigation capabilities also benefit from

the group's several former federal judicial clerks, including from the US Supreme Court, the 9th US Circuit Court of Appeals and several US district courts. Working from offices in the United States and abroad, the group serves domestic and international companies in merger review, competition litigation, intellectual property matters, consumer protection and privacy, and criminal antitrust defense and related price-fixing litigation.

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