



New Criminal and Civil Risks Posed by No-Poach and Wage-Fixing Agreements

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Today's eLunch Presenters



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Agenda

1. What Are Wage-Fixing and No-Poach Agreements?
2. Why Do We Care?
3. How Can We Reduce Our Criminal and Civil Exposure?



What Are Wage-Fixing and No-Poach Agreements?

What Are Wage-Fixing and No-Poach Agreements?

1. An agreement
2. Among competing employers
3. To limit or fix the terms of employment for potential hires
4. That constrains individual firm decision-making
5. With regard to wages, salaries, or benefits; terms of employment or even job opportunities



Wage Fixing = Price Fixing

- Agreement with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range

PAYCHECK		<i>AnyBusiness, Anytown, USA</i>	2004
<i>PAY TO THE ORDER OF</i>		Valued Employee	\$ 445.55
Four Hundred Fortyfive and 55 cents		Dollars	
Weekly Hours:	40		
Total Overtime:	12		
Total Hours:	52		
		<i>AnyBusiness</i>	
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Includes Agreements That Affect Any Element of Compensation

- Base salaries
- Overtime
- Sign-on incentives
- Cash, stock, merit, or discretionary bonuses
- Agreeing not to give counter-offers
- Deferred compensation
- Anything that affects the value of compensation

Agreement Need Not Specify a Wage

- Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)
 - Agreements to set terms of employment state a claim under Section 1 of the Sherman Act. *Anderson v. Shipowners Assoc.*, 272 U.S. 359 (1926)
 - Joint efforts that affect wages have been condemned. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990)
 - Agreements to establish min. or max. prices also condemned. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982)
 - Efforts to stabilize prices are illegal. *U.S. v. Container Corp. of America*, 393 U.S. 333 (1969)

Includes Agreements Concerning Benefits

- Leave and vacation policies
- 401(k)s
- Gym memberships
- Parking and transit subsidies
- Meals or meal subsidies
- Education stipends or forgiveness
- Covered costs

No-Poach Agreements Also Take Many Forms

- Agreements with individual(s) at another company to refuse to solicit or hire that other company's employees
- Agreements limiting employee mobility, like agreements:
 - not to hire
 - not to solicit or cold-call
 - not to recruit certain employees
 - not to permit switching across companies
 - to give notice or get approval before hiring
 - to require certain prerequisites for employment

“Naked” Agreements Are Per Se Illegal



- Some practices always or almost always restrict competition
- These practices are said to have a “pernicious effect on competition and lack . . . any redeeming virtue”
 - *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958)
- They are considered “per se” illegal regardless of the economic rationale or the consequences

No Justifications for “Naked” Agreements



ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

FEDERAL TRADE COMMISSION

OCTOBER 2016

This document is intended to alert human resource (HR) professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws. The Department of Justice Antitrust

“It is unlawful for competitors to expressively or implicitly agree not to compete with one another, even if they are motivated by a desire to reduce costs.

Therefore, HR professionals should take steps to ensure that interactions with other employers competing with them for employees do not result in an unlawful agreement not to compete on terms of employment...”

“Naked” Agreements Are Per Se Illegal



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“Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, **the agreement is deemed illegal without any inquiry into its competitive effects.** Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.”

Rule of Reason for Ancillary Agreements

- Any restraint that is not considered a per se violation is generally analyzed under the “rule of reason”
- “To determine this question, the court must ordinarily consider the facts peculiar to the business, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable”
 - *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918)



- But see *Union Circulation Company v. Federal Trade Commission*, 241 F.2d 652 (2d Cir. 1957) (naked no switching agreement was broader than necessary)

Rule of Reason for Ancillary Agreements



To withstand the rule of reason, the agreement among employers concerning wages or job opportunities:

1. Must be part of a larger legitimate procompetitive employer collaboration
2. Must be “reasonably necessary” to the collaboration
3. May not be broader than reasonably necessary to achieve the efficiencies from a business collaboration

Rule of Reason for Ancillary Agreements

Wage or no-poach restrictions might be “reasonably necessary” for:

1. mergers or acquisitions, investments, or divestitures
2. contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees
3. settlement of legal disputes
4. contracts with resellers or OEMs
5. contracts with providers or recipients of services
6. the function of a legitimate collaboration agreement

Information Exchanges: Rule of Reason or Evidence of a Per Se Agreement?



- An agreement just ***to exchange*** wage or benefit information

“Sharing information with competitors about terms and conditions of employment can also run afoul of the antitrust laws. Even if an individual does not agree explicitly to fix compensation or other terms of employment, exchanging competitively sensitive information could serve as evidence of an implicit illegal agreement. While agreements to share information are not per se illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect”

Proof of Agreement

- Prerequisite to establish a Section 1 violation



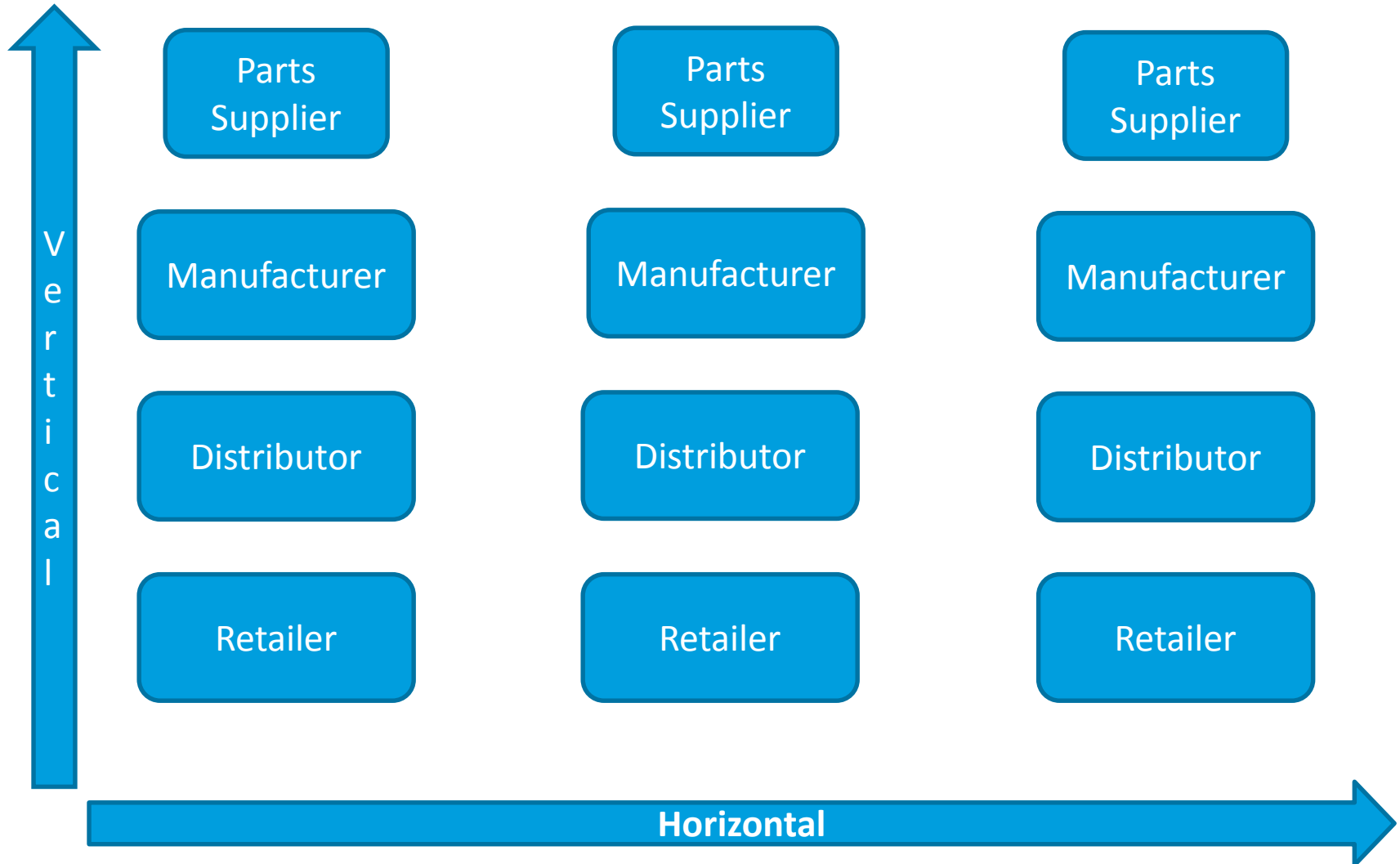
- Agreements do not need to be formal or written
 - It is unnecessary to prove an overt, formal agreement among wrongdoers; a mere understanding can suffice
 - *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969)

Wage-Fixing and No-Poach Agreements Have a Broader Reach



- *Little training and awareness have led to a prevalence of violations*
- *Labor markets are different and broader*
- *The per se rule applies to many more wage-fixing and no-poach agreements than price-fixing or output reduction agreements*

Competing Employers May Be Vertical *OR* Horizontal



Competing Employers May Be Vertical *OR* Horizontal



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“From an antitrust perspective, **firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.**”



Why Do We Care?

Recent Agency Enforcement

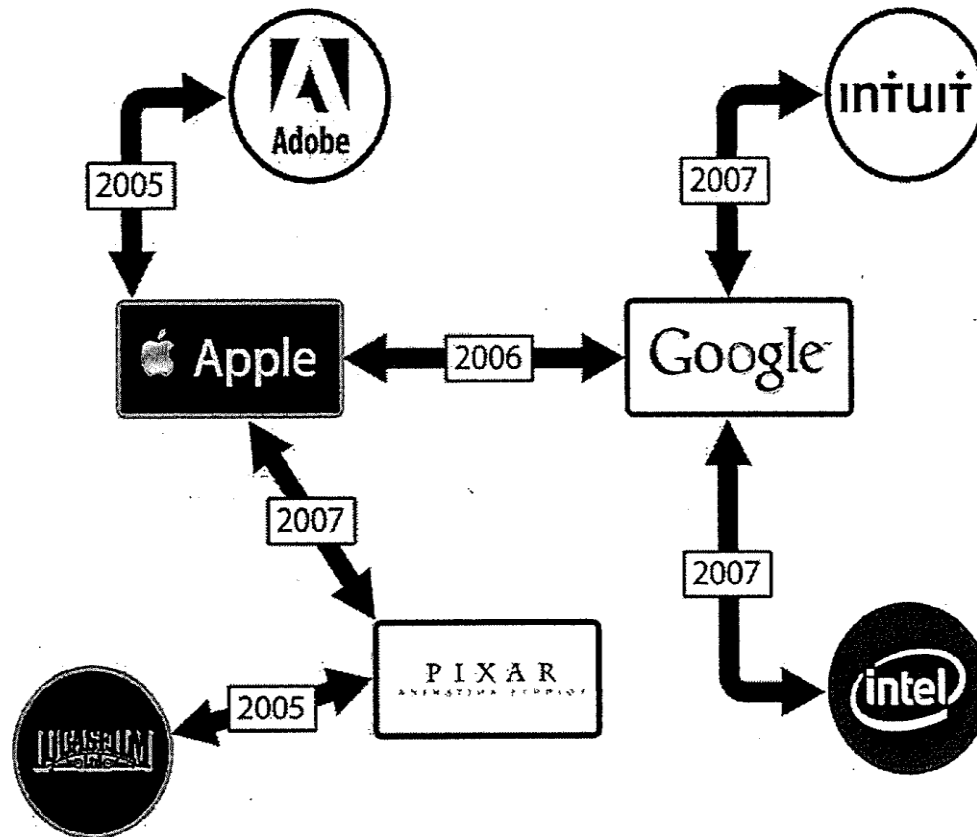


The FTC and DOJ have taken aggressive positions that have gone largely unchallenged:

- *FTC v. Debes Corp.* (filed 1992)
- *DOJ v. Utah Society for Healthcare Human Resources Admin.* (filed 1994)
- *FTC v. Council for Fashion Designers of America* (filed 1995)
- *DOJ v. Adobe, Apple, Google, Intel, Intuit, Pixar* (filed 2010)
- *DOJ v. Lucasfilm* (filed 2010)
- *DOJ v. eBay* (filed 2012)

Follow-On Private Litigation

*In re High Tech Employee Antitrust Litigation –
Settled in 2015 for \$435 million*



Follow-On Private Litigation

- *In re Animation Workers Antitrust Litigation* – Settled in 2017 for \$168 million



Criminal Prosecution



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“Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.

These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel product. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others’ employees. And if that investigation uncovers a naked wage-fixing or no-poaching agreement, **the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.”**

Massive Criminal and Civil Exposure

- DOJ could bring criminal prosecution against individuals, the company, or both
- Federal antitrust agencies could also bring civil enforcement actions
- Could be followed by state Attorneys General
- Employees could also file civil lawsuits for treble damages and attorneys' fees



DOJ Corporate Fines

- Fines of up to \$100 million or twice the loss or gain caused by the anticompetitive conduct
 - Corporate monitor could be appointed by DOJ to oversee company's behavior at high cost to company
 - Guilty plea or indictment possible
 - Reputational harm



DOJ Corporate Price-Fixing Fines

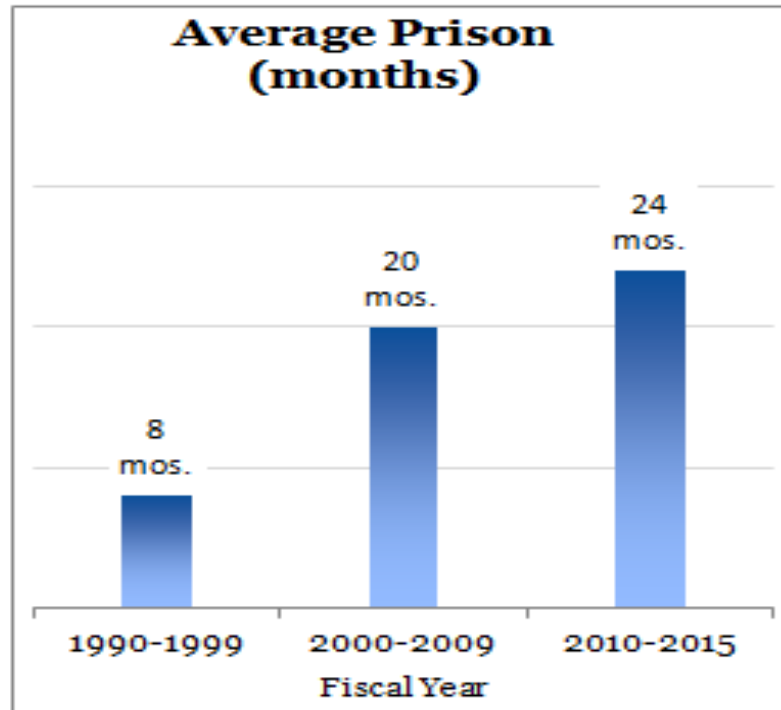
Defendant	FY	Product	Fine
Citicorp	2017	Foreign currency exchange	\$925 million
Barclays, PLC	2017	Foreign currency exchange	\$650 million
JPMorgan Chase & Co.	2017	Foreign currency exchange	\$550 million
AU Optronics (imposed after conviction at trial)	2012	Liquid Crystal Display (LCD) Panels	\$500 million
F. Hoffmann-La Roche, Ltd.	1999	Vitamins	\$500 million
Yazaki Corporation	2012	Automobile parts	\$470 million
Bridgestone Corporation	2014	Anti-vibration rubber products for automobiles	\$425 million
LG Display Co., Ltd & LG Display America	2009	Liquid Crystal Display (LCD) Panels	\$400 million

DOJ Individual Fines

Fines for individuals involved of up to \$1 million or twice the loss or gain caused by the anticompetitive conduct



Prison Sentences



The DOJ now insists on jail sentences for all individual defendants – domestic and foreign



How Do We Reduce Our Criminal and Civil Exposure?

DOJ Leniency



- Department of Justice (DOJ) offers amnesty to first company to cooperate
 - No fines
 - All cooperating employees protected from prosecution
- Benefits in civil class actions

DOJ Leniency

- Later cooperating companies qualify for fine reductions and other benefits
- Significant value of being second, as opposed to third or fourth
 - Cooperation discount
 - Discount generally applied to minimum guidelines fine
 - Reduce scope of affected commerce
 - Potential to negotiate carve-outs



DOJ Leniency

- Speed Wins
 - Creates “race” to self-report and avoid penalties
- Obtaining a “Marker”
 - Report that counsel has uncovered some evidence indicating a criminal antitrust violation
 - Disclose the general nature of the conduct
 - Identify the industry, product, or service involved
 - Identify the client
- Markers generally granted for 30 days but can be extended if the applicant is making a good-faith effort to complete its application

Top 10 Exposure Reducing Steps

1. Must look back at least 5 years to evaluate high-risk conduct
2. Train HR professionals AND executives involved in recruitment while soliciting feedback
3. Conduct employee interviews
4. Trust but verify: Consider running searches for email extensions
5. Identify and withdraw from high-risk agreements
6. Assess risk of criminal enforcement
7. Weigh benefits and risks of seeking a marker/leniency (DOJ)
8. Evaluate potentially overbroad contracts and consider revising
9. Set up real-time counsel connections in advance
10. Unequivocally reject and weigh reporting invitations to collude (FTC)

Invitations to Collude Violate the Law



A mere “invitation to collude” by entering a wage-fixing or no-poach agreement can violate the FTC Act

- “[M]erely inviting a competitor to enter into an illegal agreement may be an antitrust violation – even if the invitation does not result in an agreement to fix wages or otherwise limit competition”
- “[P]rivate communications among competitors may violate the FTC Act if (1) the explicit or implicit communication to a competitor (2) sets forth proposed terms of coordination (3) which, if accepted, would constitute a per se antitrust violation”

Lower Risk of Ancillary Agreements

1. Make sure restrictions are necessary and narrowly tailored to achieve a procompetitive purpose of a broader collaboration
2. Document procompetitive justifications contemporaneously
3. Include procompetitive justifications in the broader contract
4. Apply restrictions only to specifically identified employees, positions or geographic areas directly involved in the collaboration
5. Provide clear termination events with short time periods
6. Notify affected employees that the company's contracts with other firms may contain restrictions on hiring and recruitment activities
7. Document unilateral policies regarding the recruitment and hiring of other firms' employees and the independent decision making process used to create those policies

Hypothetical: Parental Leave



Allie from Company A mentions to her friend Betty at Company B that she has been working on a new parental leave policy. Betty wants to be helpful and offers to send Allie company B's policy. Company A was debating whether it should extend paid leave, but chooses not to when Allie learns Company B has not done so

Violation?

- A. No, Betty was just trying to help
- B. Yes, Allie and Betty may have a wage-fixing agreement and could be criminally prosecuted along with Companies A and B
- C. Yes, Allie and Betty agreed to exchange competitively sensitive information and Companies A and B could be held liable for treble damages under the rule of reason
- D. Possibly B or C depending on whether it is inferred from the information exchange that Allie and Betty agreed to limit leave

Hypothetical: Consulting



Company A has been supplying consulting services to Company B. Company B employees like Company A so much when it is on the job site that Company B employees keep leaving to join Company A. Bob from Company B is getting annoyed so Andrew from Company A and Bob agree that Company A will not hire anyone from Company B

Violation?

- A. No, the restriction is part of larger employer collaboration
- B. No, the restriction relates to a consulting agreement
- C. No, they are not competing employers because A is a supplier to B
- D. Yes, the restriction is broader than reasonably necessary

Hypothetical: Efficiencies



Allie, Betty, and Charlie work for companies that spend a lot of money on recruiting each year, but have found that after all of their efforts, recruits will come for the training then jump ship to competitors soon after. They decide they could save a lot of money and time if they agree not to recruit trainees at each other's firms, but established employees are fair game

Violation?

- A. No because they are reducing costs
- B. Not if they use the money they save to increase wages
- C. No, recruiters coordinate like this all the time
- D. Yes, this is a naked no-poach agreement

Want More Information?

- See Susannah's article entitled, "*Human Resources: The Next Antitrust Frontier*," which won "Best Business General Antitrust Article" from the 2016 Antitrust Writing Awards, *available at*:

<http://cdn2.winston.com/images/content/1/0/v2/104124/Winston-Insight.pdf>

- *Call or email us!*

Thank You.



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