

November 2022

Follow @Paul_Hastings



Guilty Plea in Criminal Attempted Monopolization for Inviting Collusion Highlights Elevated Antitrust Risk

By [Michael Murray](#) & [Noah Pinegar](#)

The Department of Justice's Antitrust Division secured a guilty plea in an invitation-to-collude case, making good on the DOJ's warning it would pursue criminal charges in certain monopolization cases and highlighting the elevated antitrust risk environment.

The owner and president of a Montana paving and asphalt contractor pled guilty to a felony charge of attempted monopolization, in violation of Section Two of the Sherman Act. According to the information filed in Montana federal district court, Nathan Nephi Zito runs a company that is routinely just one of two companies that bid for crack-sealing projects overseen by the Wyoming Department of Transportation. In January 2020, Zito allegedly proposed a "strategic partnership" with his sole rival, which the rival reported to the government. The government recorded subsequent calls between Zito and his rival between March and October 2020 in which Zito proposed to refrain from bidding on projects in South Dakota and Nebraska if the rival would avoid bidding on projects in Montana and Wyoming.

The allocation scheme, according to the government, created a dangerous probability that Zito's company would have gained monopoly power in the markets for highway crack-sealing services in Montana and Wyoming. Zito faces up to ten years in prison and a maximum fine of \$1 million. Sentencing is currently set for February 2023.

The DOJ reported the case as an example of the work of the Procurement Collusion Strike Force, a joint law enforcement effort begun in November 2019 to detect and prosecute collusion and fraud in procurement.

The guilty plea reflects two developments: first, the return to prosecuting violations of Section Two (monopolization and attempted monopolization) as criminal; and second, the DOJ prosecuting as "criminal" invitations to collude. Leadership at the DOJ and FTC have emphasized their focus on the enforcement of monopolization law,¹ backed by the President's July 2021 Executive Order,² and are clearly interested in the deterrent effect of criminal prosecution. Invitations to collude, meanwhile, have typically been enforced as civil violations, as an unfair method of competition under Section 5 of the FTC Act,³ and by the DOJ under Section Two of the Sherman Act. In November 2021, the FTC voted to expand the referral program by which it sends investigations to the DOJ for potential criminal prosecution.⁴

Companies should respond to these developments in three ways. First, they should re-calibrate the resources dedicated to antitrust compliance in a heightened risk environment, where monopolization offenses may be pursued criminally. Second, they should ensure that company officials who receive invitations to collude know how to noisily reject and report those advances. Third, they should be proactive in evaluating their business practices and compliance systems in a shifting enforcement landscape.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

New York

Noah Pinegar
1.212.318.6057
noahpinegar@paulhastings.com

Washington, D.C.

Michael F. Murray
1.202.551.1730
michaelmurray@paulhastings.com

Michael S. Wise
1.202.551.1777
michaelwise@paulhastings.com

Michael L. Spafford
1.202.551.1988
michaelspafford@paulhastings.com

Gary Zanfagna
1.202.551.1940
garyzanfagna@paulhastings.com

¹ See, e.g., <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham>.

² <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

³ See Compl., *In the Matter of Fortiline, LLC*, FTC Dkt. No. C-4592 (Sept. 27, 2016); Compl., *In the Matter of 680 Ditigal, Inc. d/b/a Nationwide Barcode*, FTC Dkt. No. C-4484 (Aug. 29, 2014); Compl., *In the Matter of U-Haul Int'l, Inc.*, FTC Dkt. No. C-4294 (July 20, 2010); Compl., *In the Matter of Valassis Comm'ns, Inc.*, FTC Dkt No. C-4160 (Apr. 28, 2006).

⁴ <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-expand-criminal-referral-program-stop-deter-corporate-crime>.

Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2022 Paul Hastings LLP.