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Bridging the Guidance Gap: Exploring Criminal Sentencing for the Antitrust Division's Historical and Renewed Enforcement of Section 2

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IN MARCH 2022, RICHARD POWERS, THEN Deputy Assistant Attorney General of the Department of Justice Antitrust Division (the "Division") for criminal enforcement, stunned the antitrust bar by announcing that the Division would—for the first time since 1977—pursue *criminal* prosecutions of Section 2 of the Sherman Act, which prohibits monopolization.[1] From 1890 to 1977, the Division brought hundreds of Section 2 criminal cases,[2] but in 1977, without any changes in the law, it began to exclusively pursue Section 2 cases civilly.[3] The Division's recent announcement was thus a major break from a long-standing Division position that it would prosecute only *per se* violations of the antitrust laws. However, Mr. Powers gave no guidance about the circumstances in which the Division would consider such changes, other than to say that "[i]f the facts and the law, and a careful analysis of department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the division will not hesitate to enforce the law."[4]

Leaving aside due process concerns about the constitutionality of this abrupt change, there remain many unanswered practical questions about how the Division will pursue Section 2 cases after such a long enforcement gap. One issue that still has not been addressed—either by practitioners or, more importantly, by the Division itself—is what parameters will guide sentencing in Section 2 cases. While the Division has said that guidance can be found in the "long history of Section 2 prosecutions and accompanying case law,"[5] the U.S. Federal Sentencing Guidelines (the "Guidelines") were created in 1984 and did not exist when the Division last brought a criminal case under Section 2 in 1977, in *United States v. Braniff Airways, Inc.*[6] And, perhaps consequently, the Guidelines do not cover Section 2.[7] This leaves courts and practitioners short on guidance for sentencing in Section 2 cases.

Now, more than two years since the 2022 announcement, not much has changed. Practitioners still have very little guidance, but the Division has doubled down on its stance that it will continue to bring Section 2 criminal cases, despite the lack of a leniency policy for self-reporting potentially criminal Section 2 violations. At the 2024 ABA Antitrust Spring Meeting in Washington DC, Division officials reaffirmed that Section 2 violations would be pursued on a criminal basis and emphasized that the Division would continue its recent trend of seeking divestiture as a remedy for criminal violations of the Sherman Act. In addition to seeking a fine, "the division is committed to making sure that corporate wrongdoers in particular don't benefit from their crimes separate and apart from the cost of doing business."[8]

The gap in the DOJ's guidance can, to some degree, be filled in three ways: first, by—as the Division suggests—examining historical Section 2 cases; second, by looking at the three criminal Section 2 cases the Division has brought since the DAAG's 2022 announcement; and third, by reviewing comparable crimes, such as Section 1 violations or fraud offenses, and the sentencing guidelines associated with them.[9] Due to the possibility that courts may use Section 1's Guidelines as a reference, attorneys should, out of an abundance of caution, advise their clients that Section 2 criminal offenses may be taken at least as seriously as Section 1.

Historical Section 2 Criminal Cases Offer Limited Sentencing Guidance

From 1890 to 1977, the Division brought over 1,000 criminal antitrust cases. However, of those, only 168 included Section 2 criminal monopolization allegations.[10] And almost all of those 168 cases also alleged coordinated behavior among or between competitors, such as price fixing and customer allocation, behavior normally charged under Section 1. Only 20 Section 2 cases involved unilateral conduct,

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and in 8 of those cases, the criminal charges were either dismissed as to all defendants or all the defendants were found not guilty.[11]

Nonetheless, some clear trends emerge from the 12 pre-1977 cases involving unilateral conduct where the defendants were found guilty. The first is that courts very rarely imposed prison sentences, and when they did, those sentences tended to be quite short and usually limited to violent offenses. For example, in the 1933 case of *United States v. Union Pacific Produce Co.*,[12] the Division alleged that Union Pacific Produce and several of its officers used threats and acts of violence to monopolized artichoke commerce. Even so, only two of the defendants received custodial sentences (and then of only six months), and two other defendants received probation. In 1973's *United States v. Molasky*,[13] the Consensus Publishing Company and two of its officers pled guilty to monopolizing the wholesale distribution of magazines and paperback books by trying to acquire other agencies in a large area, including by inducing wholesalers to sell their businesses with threats to put them out of business. One of the defendants received a sentence of one year, but with eleven months suspended, and two years' probation. The six months that the defendant in *Union Pacific Produce* received was the longest for a violent offense, while the longest for a non-violent offense was one month in *Molasky*.[14] These sentences are particularly short, considering that the Sherman Act provides for a maximum sentence of ten years' imprisonment.

Second, the fines that courts imposed were often quite small, even accounting for the effects of inflation. For instance, in *United States v. United Fruit Company*,[15] the Division alleged that United Fruit flooded the banana market and used unlawful pricing and supply practices to maintain a monopoly, but United Fruit only received a fine of $2,000. Similarly, in *United States v. Chattanooga News-Free Press Co.*,[16] the Division alleged that defendant newspapers used anticompetitive advertising practices, but each defendant was fined only one cent. In *United States v. Union Camp Corp.*,[17] the Division accused Union Camp and several of its employees with using an invalid patent to force a manufacturer to restrict its sales, which resulted in comparably large fines of $75,000 for the company, $50,000 for one individual, and $5,000 for two other individuals. These fines are a fraction of the more significant volume of commerce-based fines available under the Sherman Act.

Although the Division insists that practitioners should reference past Section 2 criminal cases to glean the information essential to develop guidance for clients, there is ultimately relatively little to review.[18] Indeed, as former Division head Donald Baker noted, Section 2 criminal enforcement has always been unusual, and "[s]ingle firm violations under section 2 of the Sherman Act have not generally been regarded as suitable for criminal prosecution, even though some very clearly predatory conduct might be treated under that provision."[19] Sherman Act violations were not even considered felonies until the passage of the Antitrust Procedures and Penalty Act of 1974, which amended Sections 1 through 3 of the Sherman Act to change "misdemeanor" to "felony." Given the abandonment of Section 2 as a tool for criminal enforcement, there are few examples of penalties associated with Section 2 felony convictions. Further, those few available cases involve fines and prison sentences that are at odds with the Division's increasingly aggressive enforcement of the antitrust laws. While practitioners can certainly use those cases to argue for relatively light fines and non-custodial sentences, the different enforcement context and dated nature of the cases may well limit the effectiveness of those arguments.

DOJ Renews its Use of Section 2 for Criminal Enforcement

Since its March 2022 announcement, the DOJ has brought three criminal Section 2 cases, *United States v. Zito* ("*Zito*"),[20] *United States v. Martinez* ("*Martinez*"), [21] and *United States v. Tomlinson* ("Tomlinson").[22]

Zito. In the first case, Nathan Zito, the president of a paving and asphalt contracting company, attempted to monopolize the markets for highway crack-sealing services in Montana and Wyoming by proposing that his company and its competitor allocate regional markets. The facts in *Zito* were straightforward: Mr. Zito himself approached a competitor about a "strategic partnership" and proposed that the competitor stop competing with Mr. Zito's company for highway crack-sealing projects administered by Montana and Wyoming, and in return his company would stop competing with the competitor for projects in South Dakota and Nebraska. Mr. Zito even offered to pay his competitor $100,000 as additional compensation for lost business in Montana and Wyoming, and then further proposed that he and his competitor enter into a sham transaction to disguise their collusion. Instead of colluding with Mr. Zito, the competitor informed the government about Mr. Zito's proposal and subsequently assisted the Division by recording phone calls with Mr. Zito. This "invitation to collude" is reminiscent of an earlier civil case, *United States* v. *American Airlines*[23], which supported the idea that an invitation to collude could constitute an attempt to monopolize under Section 2.

On October 14, 2022, Mr. Zito pled guilty to one count of attempted monopolization in violation of the Sherman Act. Consistent with the approach that courts took in the pre-1977 period, the Court sentenced Mr. Zito to only three years' probation and a $27,000 fine. It did so despite Mr. Zito's calculated offense level of 10 that resulted in a sentencing guidelines range of 6 to 12 months imprisonment.[24] The Court cited several reasons for its relatively light sentence: that Mr. Zito was a first-time offender, that he accepted responsibility, and that he had already experienced negative consequences, namely, losing his business. The judge even noted that she thought Mr. Zito's likelihood to commit another crime was zero.

While this was a clear-cut case for the Division—Mr. Zito's competitor immediately informed the government of Mr. Zito's proposed collusion, and Mr. Zito subsequently pled guilty—it has yet to be seen if the sentence imposed in *Zito* is the start to a continuation of the pre-1977 trend of light sentences, or if it proves to be an outlier in an otherwise aggressive enforcement approach from the Division.

Martinez. In *Martinez* the Division charged drastically different conduct than in *Zito*. On December 6, 2022, the DOJ unsealed an 11-count indictment charging 12 individuals in a long-term conspiracy to monopolize the "transmigrante forwarding industry"[25] in the Los Indios, Texas, border region near Harlingen and Brownsville, Texas.

The indictment alleges that the defendants forced non-conspiring transmigrante agencies and transmigrante market participants to participate in "The Pool," where agency revenues were pooled together and divided according to percentages agreed to by the conspiring agencies; forced non-conspiring transmigrante agencies and transmigrante market participants to work on "commission" (meaning agencies and market participants were required to pay conspiring agencies to access broker services and to charge the fixed prices agreed to by the conspiring agencies); charged an "extortion tax" for each vehicle that a transmigrante transported across the Los Indios Free Trade Bridge; and deterred new entrants or disruptive outsiders who operated outside of, or refused to participate in, "The Pool."[26] Among other tactics, the indictment alleges that defendants maintained their monopoly through threats and violence.[27]

Martinez stands in stark contrast to the other recent Section 2 cases, *Zito* and *Tomlinson*, for the violence involved and the presence of a price fixing conspiracy. While a jury trial will not take place until February 2025,[28] *Martinez* already illustrates DOJ's innovation in applying Section 2 to more atypical fact patterns—*i.e.*, cases in which the bad actors utilize actual violence and other, less common means to achieve their anticompetitive goals. However, and as will be determined following next year's trial, that very innovation may make it all the more difficult to sentence Section 2 cases consistently, particularly ones that do not involve any (threat of) violent conduct.

Tomlinson. DOJ's most recent Section 2 criminal case, filed on December 12, 2023, did not originally include a Section 2 charge. However, on April 8, 2024, DOJ filed a Superseding Information charging Ike Tomlinson with a Section 2 violation. In *Tomlinson*, the defendant was charged with conspiring to corner the market for contracts to assist the U.S. Forest Service in combatting wildfires. Pursuant to a plea agreement, Tomlinson pled guilty to his role in a conspiracy to monopolize the market for fuel truck services to the U.S. Forest Service's Great Basin region from 2020 through March 2023.

Significantly, Tomlinson had previously sold companies to two unnamed co-conspirators and continued to have a role in their operations, which the DOJ described as an "unusual business relationship." The two unnamed co-conspirators will not be prosecuted under Tomlinson's plea agreement. It is unclear whether the DOJ agreed to not prosecute these two conspirators in exchange for Tomlinson's guilty plea. As of this article's publication, Tomlinson has not yet been sentenced, and so it's unknown whether Tomlinson will receive a minor sentence like Zito, or if the court will impose imprisonment and a larger fine as part of further Section 2 deterrence. In short, both the historical cases and the three more recent cases still leave practitioners short of reliable, useful sentencing guidance.

Antitrust Practitioners Must Look to Comparable Crimes for Sentencing Guidance

Without robust guidance from either the pre-1977 Section 2 cases and the three more recent Section 2 criminal cases, courts and practitioners will likely need to turn to the criminal antitrust section of the DOJ Justice Manual and comparable crimes to determine how to approach sentencing guidelines for Section 2 cases.

Section 1 Guidelines. The most logical point of comparison is Section 2R.1.1 of the Guidelines, which applies to the Sherman Act Section 1 violations of bid-rigging, price-fixing, and market-allocation. The DOJ Justice Manual specifically provides that "[i]n antitrust cases, sentencing recommendations that are consistent with the U.S. Sentencing Commission Guidelines for antitrust violations . . . generally reflect an appropriate balance of the factors" in the Principles of Federal Prosecution.[29] According to the Guidelines, the base offense level of these violations is 12, but the base level can be increased by 1 level for participation in bid rigging, and up to 16 levels if the volume of the commerce attributable to defendant was more than $1,850,000,000.[30] Moreover, if prosecutors bring both Section 1 and 2 claims, the Section 2 claim may be used to increase the volume of commerce at issue, thereby enhancing the sentence for the Section 1 violation. Individual fines range from 1%-5% of the volume of commerce, but not less than $20,000.

Section 1's "volume of commerce" approach is likely to be helpful to courts and practitioners assessing violations of Section 2. Like Section 1 violations, a defendant's monopolization or attempted monopolization has the potential to involve billions of dollars in commerce and should be assessed based on the aggregate effect that the defendant's conduct had upon the relevant market. Additionally, fines ranging from 1%-5% of the "volume of commerce" can also be applied as a deterrent to Section 2 defendants, given the amount of commerce at issue in Section 2 cases. If courts and prosecutors believe that a monopolist or attempted monopolist is a more significant bad actor and in a better position to pay fines, the specific percentage range of "volume of commerce" to assess a fine can be increased accordingly.

However, the large fines that can be assessed under Section 1's Guidelines are inconsistent with the fines traditionally levied under Section 2 and with the one contemporary

precedent in *Zito*. Still, the possibility that courts could use Section 1's Guidelines as a reference should caution attorneys from advising their clients that Section 2 criminal offenses are not to be taken as seriously as Section 1.

Comparable Crimes. According to the DOJ's Antitrust Primer for Federal Law Enforcement Personnel, the Antitrust Division and law enforcement agencies routinely discover companion criminal offenses while investigating violations of the Sherman Act, including "substantive offenses that are related to the anticompetitive conduct (like mail fraud, wire fraud and money laundering . . . .)." Thus, because of the similarity in the conduct underlying the crimes, courts and prosecutors may also look to sentencing guidelines for these crimes.

Mail Fraud and Wire Fraud. The DOJ has criminally prosecuted "invitations to collude" as wire fraud despite the conduct being normally within the realm of Section 1.[31] These cases have clear parallels with *Zito*, where the conduct was an unsuccessful invitation to collude. Given DOJ's use of the wire and mail fraud statutes to prosecute conduct within the realm of traditional Section 1 conspiracies, courts and prosecutors may also look to the mail and wire fraud statutes as a reference for monopolization and attempted monopolization under Section 2.

Section 2B1.1 of the Sentencing Guidelines in large part covers economic crimes such as Larceny, Embezzlement, Forgery, and Fraud and Deceit. According to the Guidelines, wire fraud under 18 U.S.C. § 1343 and mail fraud under 18 U.S.C. § 1341 each receive a base offense level of 7. Similar to how the Guidelines for Section 1 crimes use "volume of commerce" to quantify the effect of the conspiracy or restraint of trade, mail fraud and wire fraud can be enhanced by up to 30 levels based on the amount of loss suffered as a result of the crime.[32]

The Guidelines for mail and wire fraud also feature enhancements of up to six levels based on the number of victims and the resulting financial hardship. *See* § 2B1.1(b)(2). Although most antitrust violations do not significantly impact consumers on an individual basis, some violations have the ability to result in financial hardships to individual consumers. For example, a drug manufacturer's violation of Section 2 by preventing generic entry to the market keeps drug prices artificially inflated and can cause substantial financial harm to consumers relying on the drug who otherwise would benefit from price competition. Under this theory of harm, the enhancements in § 2B1.1(b)(2) could be applicable to the court's and prosecutor's assessment of appropriate sentences for Section 2 violations.

Money Laundering. Section 2S1.1 of the Guidelines covers the money laundering related offenses of: (1) Laundering of Monetary Instruments under 18 U.S.C. § 1956; and (2) Engaging in Monetary Transactions in Property Derived from Unlawful Activity under 18 U.S.C. § 1957. According to the Guidelines, enhancements exist when the defendant is in the "business of laundering funds" or when the offense "involve[s] sophisticated laundering."[33] When deciding whether an enhancement for the business of laundering funds exists for a defendant who did not commit the underlying offense, the court considers the totality of the circumstances including: (1) whether the defendant regularly engaged in laundering funds; (2) whether the defendant engaged in laundering funds during an extended period of time; (3) whether the defendant engaged in laundering funds from multiple sources; (4) whether the defendant generated substantial amount of revenue in return for laundering funds; and (5) the defendant's prior convictions for committing such offenses.[34]

Courts and prosecutors could rely on these money-laundering sections when determining offense levels and enhancements for conduct that violates Section 2. Like money laundering offenses, violations of Section 2 involve specific schemes to capture illicit financial gains and are often the result of complex and intricate conduct designed to avoid detection and maximize the returns from the illegal conduct. When assessing the gravity of the Section 2 offense, courts and prosecutors may use a totality of the circumstances approach and may ask questions similar to those identified in Commentary to § 2S1.1, such as: (1) how long the defendant monopolized or attempted to monopolize the market; (2) did the defendant obtain a substantial amount of revenue from its monopolization or attempted monopolization; and (3) what is the defendant's history with antitrust offenses in general.

However, the fact remains that unless Congress revises the Sentencing Guidelines, there is an absence of clear Congressional direction to the DOJ. The current Guidelines, as noted above, were developed in 1984, after DOJ stopped prosecuting Section 2 cases as felonies. Thus, using the Sentencing Guidelines as a reference may also be of limited value because the Sentencing Guidelines Commission had no reason to consider the need for Section 2 Guidelines.

Conclusion

The Division has done little to help practitioners understand the many practical issues that the resumption of criminal Section 2 enforcement has created. Until the three recent cases following the March 2022 policy announcement, the prior Section 2 criminal case had been brought nearly a half-century ago in 1977. Those pre-1977 cases provide little guidance and the Sentencing Guidelines do not cover Section 2. Moreover, most of the pre-1977 cases were brought before the Antitrust Procedures and Penalties Act of 1974, which increased maximum fines and prison sentences for antitrust violations.[35] Only one criminal Section 2 case—*Zito*—has reached the sentencing phase, and it was a relatively small and straightforward case. If the Division brings more significant cases against larger entities, then courts or the Division may look to other sections of the Guidelines for sentencing guidance—which would provide the potential for larger fines and longer terms of imprisonment. The Sentencing Commission

may ultimately have to be persuaded to consider revising the Guidelines to address Section 2.

Where does all of this leave a practitioner seeking to guide a client who may be facing criminal Section 2 charges?

- Regardless of the guidelines range, *Zito* shows that traditional arguments used at sentencing (such as remorse and lack of risk of recidivism) remain vitally important.
- Practitioners should use the case law to argue for modest fines, for no period of incarceration and remain vigilant against the Division taking a more aggressive approach.
  - If the Division charges Section 1 with Section 2 claims, it may seek to use the Section 2 claim to enhance the Section 1 penalty.
  - If the Division brings a truly unilateral criminal section 2 claim to trial, counsel may consider raising notice objections if the DOJ seeks significant jail time.
- Practitioners should emphasize to clients that past light sentences and fines do not guarantee similar results in the future, and so there remains a heightened need to maintain increased vigilance against monopolization conduct.[36]
- Similarly, practitioners should be mindful that the DOJ's Leniency Policies are focused squarely on Section 1 and should be cautious about the value of any Section 2 conduct disclosure.
- Companies should take this opportunity to revisit antitrust policies and guidance and ensure that they are fully responsive to current Division priorities. ■

[1] Section 2 of the Sherman Act makes it unlawful for any legal person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 2 (2000). There are three monopolization offenses: (1) monopolization; (2) attempted monopolization; and (3) conspiracy to monopolize. Monopolization itself has two elements: (1) one must possess monopoly power in the relevant market; and (2) one must willfully acquire or maintain that power, as distinguished from acquiring the power as a result of a superior product, business acumen, or a historic accident. A key distinction between Section 1 and Section 2 is that conduct charged under Section 2 usually (though not always) involves uniliteral conduct by one person.

[2] Mr. Powers stated in June 2022, "Historically, the antitrust division did not shy away from bringing criminal monopolization charges when companies and executives committed flagrant offenses intended to monopolize markets . . . and by my count, the Justice Department has brought over 100 criminal monopolization cases. Michael Acton, *US DOJ's Exploration of Criminal Charges for Monopoly Breaches Follows Decades of Underenforcement, Powers Says,* MLex (June 7, 2022).

[3] "The Justice Department's policy on criminal enforcement of the Sherman Act has evolved over the decades since 1890. As an entry point to this history, it is useful to begin with a speech given in 1978 by Assistant Attorney General Donald Baker that presented a retrospective on the Justice Department's understanding of its own history on criminal antitrust enforcement. Baker's speech came at a significant moment for purposes of my analysis here. Although Baker's focus was criminal Section 1 rather than Section 2 cases, it coincided with the Justice Department's abandonment of criminal monopolization cases—the last one ever having occurred the year before Baker's speech." Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment,* 84 Antit. L. J. 753, 758 (2022).

[4] Office of Public Affairs, Deputy Assistant Attorney General Richard A. Powers Delivers Keynote at the University of Southern California Global Competition Thought Leadership Conference, U.S. Dep't of Just. (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-keynote-university-southern.

[5] *Id.*

[6] 453 F. Supp. 724 (W.D. Tex. 1978).

[7] The Antitrust Division Manual, which was withdrawn from the Antitrust Division website in 2022, included guidance on when the DOJ would bring criminal prosecutions—but it did not mention Section 2, and it has not been replaced. *See* Division Manual, U.S. Dep't of Just. (Mar. 1, 2022), https://www.justice.gov/atr/division-manual.

[8] Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment,* supra note 3, at 758.

[9] Office of Public Affairs, Deputy Assistant Attorney General Richard A. Powers Delivers Keynote at the University of Southern California Global Competition Thought Leadership Conference, U.S. Dep't of Just. (June 3, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-keynote-university-southern.

[10] Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment,* Univ. of Mich. L. & Econ. Rsch. Paper No. 22-030 1, 10 (June 14, 2022), https://www.americanbar.org/content/dam/aba/publications/antitrust/journal/84/3/criminal-enforcement-section-2-sherman-act.pdf.

[11] *Id.*

[12] No. Cr. 94-143 (S.D.N.Y Apr. 7, 1933).

[13] No. Cr. 73-514B (E.D. La. Oct. 11, 1973).

[14] Daniel A. Crane, supra note 10, at 10.

[15] No. Cr. 32416 (M.D. Cal. July 16, 1963).

[16] No. Cr. 7978 (E.D. Tenn. June 13, 1940).

[17] (E.D. Va. 1963).

[18] On this point, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), may be instructive. *Copperweld* held that a parent company is incapable of conspiring with a wholly owned subsidiary. While *Copperweld* was a Section 1 case, it held that a parent and subsidiary could be subject to Section 2. *Id.* at 777.

[19] Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging,* 69 Geo. Wash. L. Rev. 693, 695 (2001).

[20] Information as to Nathan Nephi Zito, *United States v. Zito*, 1:22-cr-00113-SPW (D. Mont. Sept. 19, 2022), ECF No. 1.

[21] Indictment, *United States v. Martinez*, Crim. No. 4:22-cr-00560 (S.D. Tex. Nov. 9, 2022), ECF. No. 1 ("Indictment").

[22] First Superseding Information as to Def. Ike Tomlinson, *United States v. Tomlinson*, Crim. No. 1:23-cr-00326-AKB (D. Idaho Apr. 8, 2024), ECF. No. 35.

[23] *See* 743 F.2d 1114 (5th Cir. 1984).

[24] The Court explained the guidelines calculation as follows: "With regard to the Guidelines, the adjusted offense level is 12. We arrive at that by beginning with a base offense level of 12, subtracting – or adding one level for the reason that there was an agreement to submit noncompetitive bids, adding two more levels for the reason that the volume of commerce attributable to the defendant was 2,700,000, and then subtracting three levels for the reason that this is attempted monopolization, and it was not fully completed. Then, subtracting two levels for acceptance of responsibility, we arrive at a total offense level of 10. Mr. Zito has zero criminal history points so his criminal history category is I. The resulting advisory guideline range is 6 to 12 months' imprisonment. Under the guidelines, Mr. Zito is eligible for probation for a period of one to five years."

[25] Press Release, Dep't of Just., Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022), https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-

individuals-wide-ranging-scheme-monopolize-transmigran-0. The "transmigrante forwarding industry" consists of a group of businesses that offer customs-related services for individuals known as "transmigrantes." The transmigrantes transport cargo from the United States through Mexico for resale in Central America.

[26] Indictment, at 9-10.

[27] Indictment, at 8-9.

[28] The court in *Martinez* set a jury trial date for February 10, 2025. Am. Scheduling Order, *United States v. Martinez,* Crim. No. 4:22-cr-00560, Dkt No. 457 (S.D. Tex. Oct.21, 2024).

[29] *See* § 7-3.500—Sentencing.

[30] The volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

[31] *See* United States v. Ames Sintering, 927 F. 2d 232 (6th Cir. 1990) (bid rigging attempt); United States v. Critical Industries, Crim. No. 90-00318 (D.N.J. July 24, 1990), 6 Trade Reg. Rep. (CCH) ¶45,090 (Case 3722A) (price-fixing attempt).

[32] *See* § 2B1.1(b)(1).

[33] *See* § 2S1.1(b)(2)(C) (increasing by four levels for defendant's involvement in the business of laundering funds); *see* also § 2S1.1(b)(2)(3) (increasing by two levels for sophisticated laundering schemes).

[34] *See* Commentary to § 2S1.1, Enhancement for Business of Laundering Funds.

[35] Antitrust Procedures and Penalties Act, 88 Stat. 1706 (1973).

[36] Counsel could also consider contrasting Section 2 with Section 1, which the Supreme Court has characterized as the "Supreme Evil" of antitrust law. *Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 408 (2003).