

SENTENCING OF ANTITRUST OFFENDERS:
WHAT DOES THE DATA SHOW?

By Beryl A. Howell¹

While Federal antitrust enforcement involves far more than criminal prosecution of the most egregious antitrust violations, the data collected and analyzed by the U.S. Sentencing Commission regarding antitrust convictions of both individuals and organizations can illuminate the trends in criminal antitrust enforcement. This article will summarize what this data reveals about the number of criminal antitrust convictions over the last decade, as well as the penalties imposed and other statistical information related to antitrust sentencing.

Overview of Pertinent Statutory Penalties and Sentencing Guidelines. The primary antitrust statute that carries criminal sanctions is the Sherman Act. This law penalizes illegal restraints of trade and monopolies, or attempts to monopolize, with imprisonment for up to ten years and fines for individuals up to \$1,000,000 and, for corporations, up to \$100,000,000, or both, in the discretion of the court.² The Guidelines address only horizontal agreements in restraint of trade, such as horizontal price-fixing (including bid-rigging) and horizontal market allocation, for which “there is near universal agreement...can cause serious economic harm.”³ The guidelines do not provide recommendations on sentencing for other types of antitrust offenses, for which “[t]here is no consensus [] about the harmfulness,” and despite being criminal offenses in the United States, “are rarely prosecuted and may involve unsettled issues of law.”⁴

The sentencing of individuals and organizations convicted of antitrust offenses under section 1 of the Sherman Act is guided by §2R1.1 (Bid-rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) of the United States Sentencing Commission Guidelines Manual.⁵ The antitrust guideline recommends for the

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² 15 U.S.C. §§ 1, 2, 3. Although the Robinson-Patman Act, 15 U.S.C. § 13a, also provides criminal sanctions of not more than one year imprisonment and up to a \$5,000 fine, for price discrimination for the purpose of destroying competition or eliminating a competitor, the U.S. Sentencing Commission has received documentation for only one misdemeanor conviction under this statute, which is not included in this paper.

³ USSG §2R1.1, comment. (backg’d).

⁴ *Id.* In 2007, the Antitrust Modernization Commission concurred that “[n]o change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to ‘bid-rigging, price-fixing, or market allocation agreements among competitors,’ and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.” Antitrust Modernization Commission Report and Recommendations, at p. 295, Recommendation 54 (April 2007) (“AMC Report”).

⁵ Convictions under 15 U.S.C. § 3(b), which prohibits restraints of trade and monopolies in the Territories and the District of Columbia, are also expressly referred to USSG §2R1.1 for sentencing guidance. Convictions under sections 2 of the Sherman Act are not referred to any particular guideline. According to the Antitrust Modernization Commission, however, “The DOJ has in recent years forgone criminal prosecutions of unilateral conduct under section 2.” AMC Report, at p. 296-97.

imprisonment component of the sentence, a base offense level of 12, with an increase of 1 level for bid-rigging⁶ and increases in two-level increments of up to 16 additional levels, depending upon the volume of commerce in goods or services affected by the violation. For example, if the volume of affected commerce is more than \$1,000,000 and less than \$10,000,000, the offense level is adjusted by an additional 2 levels; a volume of affected commerce of more than \$1.5 billion results in the maximum increase of 16 offense levels. Accordingly, the recommended imprisonment range for an individual with no prior criminal history or other adjustments,⁷ at the base offense level of 12 is 10-16 months. By contrast, if the increases for bid-rigging and the highest volume of commerce are applied to a similarly situated individual (with no prior criminal history or other adjustments), the imprisonment range is 87-108 months, which is close to the statutory maximum of 10 years imprisonment.

At the lower offense levels (i.e., 12 or lower), defendants are generally eligible to serve a portion of the sentence in community confinement or home detention. The Commission made clear its intent that “alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.”⁸ Consistent with the original 1984 Congressional mandate to develop the sentencing guidelines cognizant of the “fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense,”⁹ the Commission intended that antitrust offenders serve prison terms more often “and usually somewhat longer” than typically imposed under pre-guidelines practice.¹⁰

Recommended fine amounts vary for individuals and organizations. Individuals may be fined from one to five percent of the affected volume of commerce but no less than \$20,000.¹¹ The fines for individuals are not affected by adjustments in the offense level that determine the recommended prison term.

Calculation of the recommended fine amount for organizations is more complex. Fines for convicted organizations are determined by applying guidance in Chapter 8 (Sentencing of Organizations) of the Guidelines Manual. The starting point is the specific direction in the antitrust guideline that “in lieu of the pecuniary loss... use 20

⁶ USSG §2R1.1(b)(1) (“If the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level”).

⁷ Adjustments in the offense level may be triggered upwards and downwards by various factors, such as aggravating role in the offense, abusing a position of trust or using a special skill, obstructing or impeding the administration of justice, accepting responsibility or providing substantial assistance to law enforcement. See USSG §2R1.1, comment. (n. 1) & backg’d. (“Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed.”).

⁸ USSG §2R1.1, comment. (n. 5). A base offense level of 12 places the offender in Zone C of the Guidelines Sentencing Table, requiring that at least half of the sentence be satisfied by imprisonment, under USSG §5C1.1(d)(2).

⁹ 28 U.S.C. § 994(m).

¹⁰ USSG §2R1.1, comment. (backg’d).

¹¹ USSG §2R1.1 (c).

percent of the volume of affected commerce” as the base fine amount.¹² The derivation of the 20 percent figure as a proxy for loss is based upon the estimated average gain from price-fixing to be 10 percent of the selling price, combined with the fact that this monopoly overcharge does not fully reflect the injury “inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices.”¹³ This mechanism for computing the base fine “is to avoid the time and expense that would be required for the court to determine the actual gain or loss.”¹⁴

The base fine is then subject to a minimum and maximum multiplier based upon the “culpability score” of the organization. Generally, multipliers range from a low of .05 to a high of 4.00, but the antitrust guideline sets the minimum multiplier at 0.75, no matter the culpability score that would otherwise apply to the organizational antitrust offender.¹⁵

The culpability score is determined based upon a number of factors, including the size of the organization, participation in the offense by high-level or substantial authority personnel, prior history of criminal conduct by the organization, violation of an order, obstruction of justice, implementation of an effective compliance and ethics program, self-reporting, cooperation and acceptance of responsibility.¹⁶ Courts may determine the appropriate fine amount between the minimum and maximum ranges resulting from application of the multiplier to the base fine. In addition, the court may depart up or down from the fine range due to various factors, including the risk presented by the offense to the integrity or continued existence of a market,¹⁷ if the organization is a public entity,¹⁸ or exceptional organizational culpability.¹⁹

Antitrust Sentencing Data. The U.S. Sentencing Commission collects data on the sentencing of individuals and organizations convicted in Federal court. The Commission relies upon this data to support various statutorily mandated research and analytical

¹² USSG §2R1.1 (d). (1); *see also* USSG §8C2.4, comment. (n.5).

¹³ USSG §2R1.1, comment (n.3). The Antitrust Modernization Commission recommended that the Commission determine, *inter alia*, whether the 20 percent proxy is “empirically sound and accurately reflects the best estimate of typical harm in antitrust cases.” AMC Report, at p. 300-01, Recommendation 52.

¹⁴ USSG §2R1.1, comment (n.3). Notably, in its most recent update of the penalties for Sherman Act violations in 2004, Congress explicitly endorsed the methodology in the antitrust guideline for calculating fines, stating, “Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy. This presumption is sufficiently precise to satisfy the interests of justice, and promote efficient and predictable imposition of penalties for criminal antitrust violations. Comments to the guidelines provide that if the actual overcharge caused by the cartel behavior can be shown to depart substantially from the presumed ten percent overcharge that underlies the twenty percent presumption, this should be considered by the court in setting the fine within the guideline fine range.” Supplemental Legislative History by Reps. Sensenbrenner and Conyers, *Cong. Rec.* H3658 (June 2, 2004).

¹⁵ USSG §2R1.1(d)(2); *see also* §8C2.6, comment. (n.1).

¹⁶ USSG §8C2.5.

¹⁷ USSG §8C4.5.

¹⁸ USSG §8C4.7.

¹⁹ USSG §8C4.11.

activities, including promulgation of guideline amendments and recommendations to Congress on sentencing policy and criminal justice issues.²⁰ The chief judge of each district is required to ensure the timely submission to the Commission of five critical documents for each conviction in a criminal case, except in cases involving solely petty offenses²¹: the judgment and commitment order, the written statement of reasons, any plea agreement, the indictment or other charging document, and the presentence report.²² For Fiscal Year (FY) 2008, for example, the Commission received documentation on 76,478 federal criminal cases, including information on 199 convicted organizations.²³

Before delving into the antitrust sentencing data, two caveats should be noted. First, the Commission is only able to analyze and report on sentencing information that it receives. Despite considerable diligence on the part of reporting courts, occasionally some details may be missing from the documentation required to be submitted to the Commission. Second, only the federal district courts are statutorily required to submit documentation on criminal convictions to the U.S. Sentencing Commission. Therefore, documentation related to criminal investigations resolved without conviction, through a non-prosecution or deferred prosecution agreement with the Department of Justice, are not submitted to the Commission nor included in the Commission's analyses of federal sentencing cases.²⁴

This second caveat is particularly important in studying antitrust sentencing data since the Leniency Program of the Department's Antitrust Division includes among the incentives for self-reporting the possible avoidance of criminal charges through non-prosecution agreements for the reporting organization as well as its officers, directors, employees and other individual agents of the organization. To the extent that criminal antitrust activity is resolved through the Leniency Program without criminal charges, the Commission's antitrust sentencing data may not fully reflect the enforcement actions of the Department.

The Commission has not recently published statistics focused solely on antitrust cases, and the relatively brief description of the statistics provided in this paper may prompt questions deserving of further analysis. The review of the antitrust cases over the

²⁰ See, e.g., 28 U.S.C. §§ 994 (c),(m), (o), (w)(3).

²¹ USSG §1B1.9, which codifies the Commission's policy decision to exclude Class B and C misdemeanors and infractions from coverage of the guidelines.

²² 28 U.S.C. § 994(w)(1).

²³ The Sentencing Commission publishes annually descriptive statistics on the implementation of the sentencing guidelines and provides district, circuit and national sentencing data. The most recent annual report is the *2008 Sourcebook of Federal Sentencing Statistics*, available at

<http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>.

²⁴ H.R. 1947, the "Accountability in Deferred Prosecution Act of 2009," was introduced on April 2, 2009, to address issues involving deferred and non-prosecution agreements, including increasing public accessibility to and judicial scrutiny of the terms of these agreements. Although this bill, in Section 4(b)(3), directs that such agreements comply with certain requirements of the United States Sentencing Guidelines, the bill does not require submission to the Commission of all such agreements to facilitate the Commission's traditional role in gathering organizational sentencing data and releasing that data to the public without compromising proprietary or confidential information of the subject organizations.

last decade described in this paper relate to seven areas: (1) the numbers of individuals and organizations convicted of antitrust offenses and/or sentenced under the antitrust guideline; (2) the median prison terms; (3) fine amounts; (4) fine adjustments for organizations; (5) probation terms; (6) the size of organizational antitrust offenders; and (7) finally, the effect of the change in 2005 to an advisory, rather than mandatory, guideline system on the sentencing of antitrust offenders.

I. Numbers of Antitrust Criminal Convictions. Over the past decade, from FY 1999 through the end of the second quarter of FY 2009²⁵, a total of 246 individual offenders were convicted of Sherman Act violations, the vast majority under section 1 and seven under section 3. Out of this total of 246, 175 individuals, for whom sufficiently complete documentation was provided to the Commission, were sentenced under the antitrust guideline, USSG §2R1.1.²⁶ As shown in **Figure 1**, while the number of offenders convicted of antitrust offenses has fluctuated from year-to-year, the most individual offenders were convicted in FY 1999, with 46 cases, and the fewest, with 10 cases, in FY2004. Data on the number of individuals convicted of antitrust offenses in FY 2009 is necessarily still incomplete.

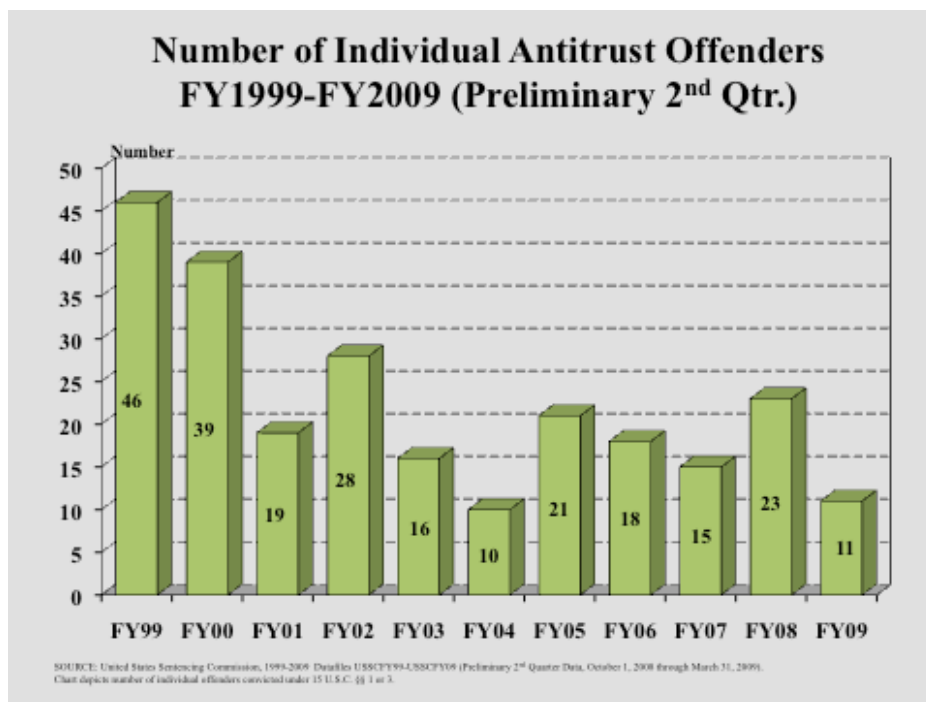


Figure 1. Number of Individuals Convicted of Antitrust Offenses

Not all of the individuals convicted of antitrust offenses were sentenced under the antitrust guideline and, conversely, not all of the individuals sentenced under the antitrust

²⁵The Sentencing Commission’s fiscal year ends on September 30. Thus, FY 1999 data covers the period from October 1, 1998 until September 30, 1999. Individual offender data for 2009 covers the period from October 1, 2008 through the end of the second quarter on March 31, 2009.

²⁶ Out of the 246 cases of individuals convicted of antitrust offenses, 35 cases were excluded due to incomplete documentation provided by the court.

guideline were convicted of substantive Sherman Act offenses. Of the 246 individuals convicted of Sherman Act offenses, 175, or 82.9 percent, for whom documentation was sufficiently complete, were sentenced under the antitrust guideline. A small number of individuals convicted of antitrust offenses have been sentenced under other guidelines due to their convictions for other crimes in addition to the antitrust violations. From FY 1999 through FY 2009 (2nd Quarter), for example, 4.3 percent (nine cases) of the individual antitrust offenders also had convictions for fraud and were sentenced under the fraud guideline at §2B1.1 (or its predecessor at §2F1.1), rather than the antitrust guideline at §2R1.1.²⁷ The remaining 12.8 percent of individual antitrust offenders, who were not sentenced under the antitrust guideline, were sentenced under the tax, bribery, extortion, or conspiracy guidelines.²⁸

Twelve individuals were sentenced under the antitrust guideline even though they were not convicted of substantive Sherman Act violations. Their offenses of conviction included mail or wire fraud (5 Cases) and charges for conspiracy or aiding and abetting under 18 U.S.C. §§ 2 or 371 (7 Cases). The courts likely determined that the antitrust guideline provided the most appropriate guidance for sentencing given the offense conduct. In short, over the last decade, a total of 187 individuals have been sentenced under the antitrust guideline, notwithstanding their offense of conviction.

Of the 187 individual offenders sentenced under the antitrust guideline, 66 were named as co-defendants along with an organization charged with antitrust violations.

Overall, slightly fewer organizations than individuals were convicted of antitrust offenses and sentenced under the antitrust guideline over the last decade. Between FY 1999 and FY 2008, a total of 143 organizations were sentenced under the antitrust guideline.²⁹ Similarly to individual antitrust offenders, the number of organizations sentenced under the antitrust guideline has fluctuated over time, with the most cases in 2002, with 23, and the fewest cases in 2004 and 2007, with seven in each of those years. As shown in **Figure 2**, these fluctuations roughly parallel the numbers of organizations convicted for all offenses, with higher numbers of convicted organizations for all offenses (including antitrust) each year from FY 1999 to FY 2002 than in the last five years.

²⁷ Convicted antitrust offenders are shown in Figure 1, whether or not they were sentenced under the antitrust guideline, USSG §2R1.1.

²⁸ Specifically, out of the 211 individual antitrust offenders with complete sentencing guideline application information, 9.0 percent (19 cases) were sentenced under the tax guideline at §2T1.1; 1.9 percent (4 cases) were sentenced under the extortion guideline at §2C1.1; 1.0 percent (2 cases) were sentenced under the bribery guideline at §2B4.1; and 0.5 percent (1 case) were sentenced under the conspiracy guideline at §2X1.1; and 0.5 percent (1 case) were sentenced under the accessory after the fact guideline at §2X3.1.

²⁹ Organizational data for FY 2009 is not yet available.

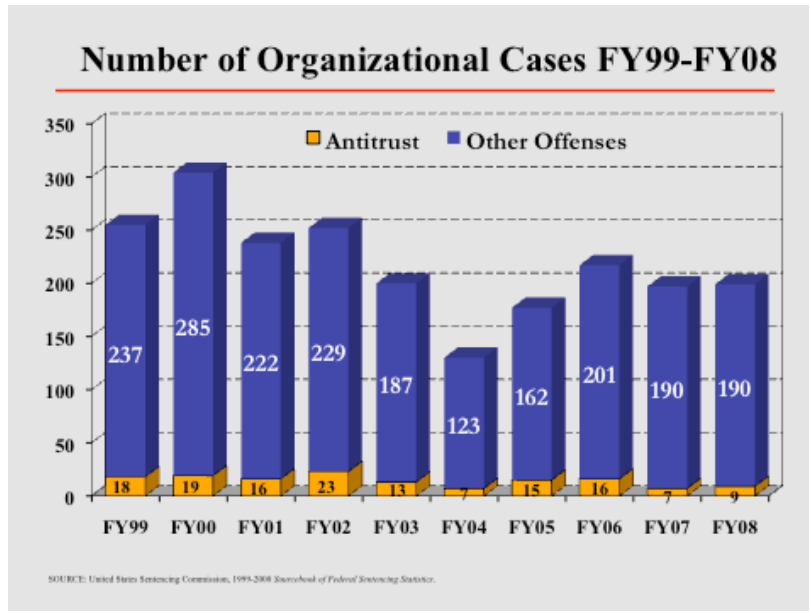


Figure 2. Number of Organizations Convicted of Antitrust and Other Offenses

In FY 2008, as shown in **Figure 3** below, antitrust offenses made up only a small percentage (five percent) of the type of cases for which organizations are convicted. The other organizational offenses run the gamut, with the largest percentage of organizations sentenced for fraud offenses, at 34 percent, and environmental crimes, at 22 percent, of all organizational cases in FY 2008.

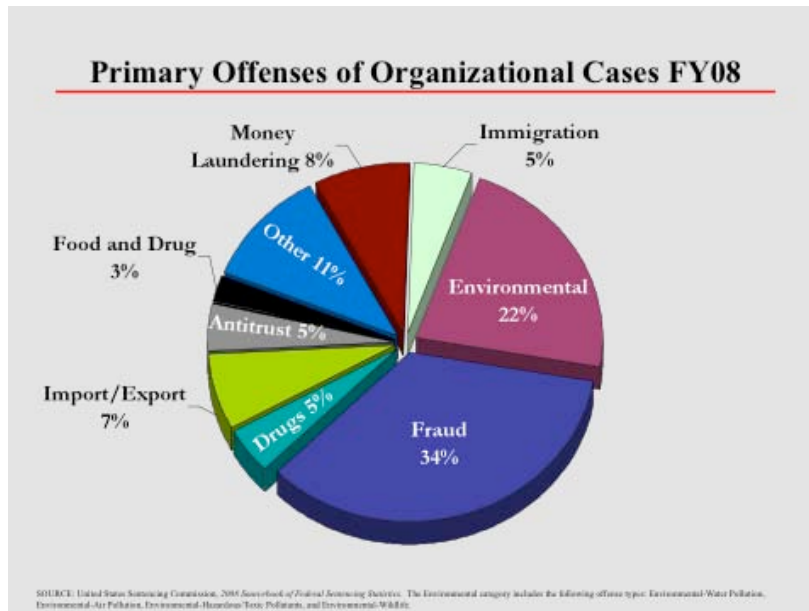


Figure 3. Percentage Breakdown of Types of Organizational Offenses

Over the past six years, the most frequent primary offense for which organizations were convicted is fraud, including such offenses as mail and wire fraud, securities fraud, Social Security fraud, fraud involving the sale of airplane parts, and false statements.³⁰

Generally, recommended sentences under the fraud guideline are higher than under the antitrust guideline. For example, for one of the seven individual antitrust offenders, who was sentenced under the fraud guideline, the offense level was determined by the probation officer to be 40 (292-365 months) under §2B1.1. In comparison, the offense level was determined to be 27 (70-87 months) under the antitrust guideline, due primarily to the fact that adjustments for loss and use of sophisticated means under §2B1.1 added 26 levels, while the bid-rigging and volume of commerce specific offense characteristics under §2R1.1 only added 7 levels.³¹ The court did not accept the probation office's calculation of the offense level and instead found the final offense level to be 30 (97-121 months). The court ultimately imposed a sentence of 90 months, varying downward from the adjusted offense level sentencing range under the fraud guideline due to the defendant's age and other factors.

2. Prison Terms. About one-third, 30.5 percent, of the 175 individual antitrust offenders sentenced under the antitrust guideline and convicted of Sherman Act violations over the last decade were sentenced to prison only; 16.7 percent were sentenced to prison, with a split sentence, including community confinement; 29.8 percent were given probation with confinement conditions, such as home detention; 1.7 percent received a fine only; and the remaining 21.3 percent were given probation only.³² The median³³ prison term for all antitrust offenders sentenced to prison is six months, ranging from a low of two weeks to a high of four years.

As shown in **Figure 5** below, over the last decade the median prison term has fluctuated by a few months but never risen over one year. The highest median prison term occurred twice: in FY 2002, a couple of years *before* Congress raised the statutory maximum penalties and the Commission increased the recommended penalties under the antitrust guidelines, and in FY 2007.

³⁰ False statement convictions include violations of 18 U.S.C. §§ 1001 (false statements generally), 1018 (false certificates or official writings), and 1020 (false statements relating to highway programs).

³¹ This defendant's offense level was adjusted upwards by the probation office under both guidelines for having a leadership role (+4), abuse of trust (+2), and obstruction (+2).

³² One case was excluded from the 175 individual antitrust cases due to incomplete documentation in computing these statistics.

³³ "Median" is not the average value, but the midpoint, meaning the value at which half the amounts are above that number and half are below that number.

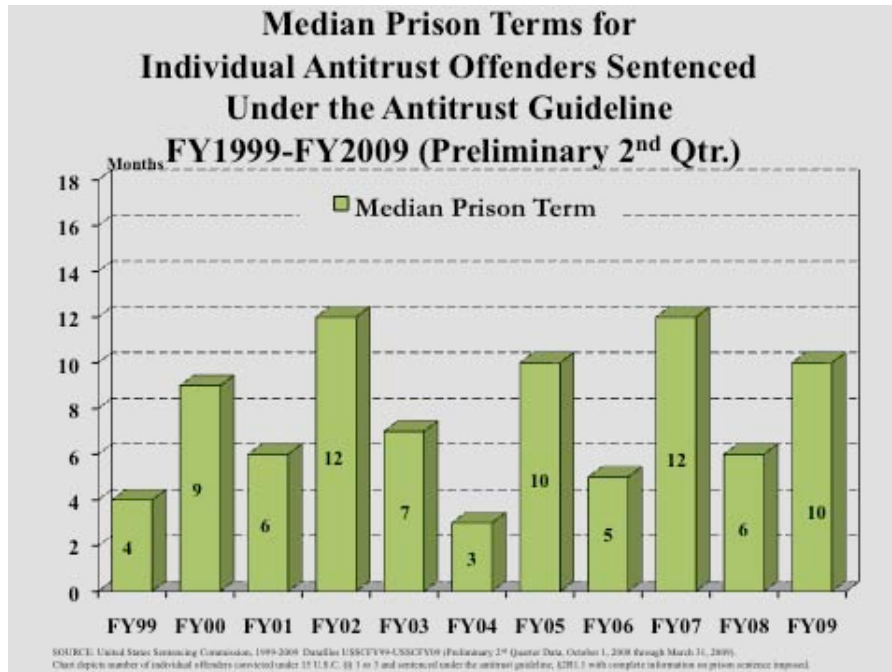


Figure 5. Median Prison Terms for Individual Antitrust Offenders

The Sentencing Commission last amended the antitrust guideline, effective November 1, 2005, to respond to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004,³⁴ which increased the statutory maximum term of imprisonment for antitrust offenses under sections 1 and 3(b) of the Sherman Act from three to ten years, and raised the maximum fine for individuals from \$350,000 to \$1 million and for corporations from \$10 million to \$100 million. The Act’s legislative history makes clear that Congress intended that the Sentencing Commission “revise the antitrust sentencing guidelines to increase terms of imprisonment for antitrust violations to reflect the new statutory maximum.”³⁵ Accordingly, the 2005 antitrust guideline amendment raised the base offense level for antitrust offenses from 10 to level 12, which amounted to almost a 25 percent increase in the recommended prison term from the 6-12 month initial sentence range applicable under the old guideline.

The 2005 antitrust guideline amendments also amended the “volume of commerce” table to raise the threshold from \$400,000 to \$1,000,000 and provide up to 16 additional offense levels applicable to offenses involving more than \$1.5 billion. The Commission explained that these changes were intended to recognize “the similarity of antitrust offenses to sophisticated frauds,” and make the antitrust penalties more proportionate to the fraud guideline in USSG §2B1.1.³⁶ Consistent with the penalty increases in the guideline amendment, certain language in the background commentary was eliminated, including language stating that “the most effective method to deter individuals committing this crime is through imposing short prison sentences coupled

³⁴ Pub. L. 108-237 (2004).

³⁵ Supplemental Legislative History by Reps. Sensenbrenner and Conyers, *Cong. Rec.* H3658 (June 2, 2004).

³⁶ USSG App. C, Amendment 678.

with large fines,” as well as other language suggesting the appropriateness of “confinement of six months or longer.”³⁷

The fact that median prison sentences do not appear to have risen following these statutory and guideline penalty increases may be due to a combination of factors, including the conversion of the guidelines from a mandatory to an advisory system in January, 2005 as a result of the Supreme Court’s decision in *United States v. Booker*.³⁸ In addition, *ex post facto* rules may result in application of antitrust penalties in effect prior to the 2004 statutory and 2005 guideline amendments.³⁹ Due to the lengthy investigations associated with antitrust cases, the effect of the penalty increases on median prison terms may be delayed. For example, of the 39 individuals convicted of antitrust offenses and sentenced under the antitrust guideline from FY 2006 to FY 2009, 71.8 percent were sentenced using guidelines manuals in effect on November 1, 2004 or prior.

3. Fine Amounts. Over three-quarters, or 79.4 percent, of the individual antitrust offenders sentenced over the last decade were penalized with a fine. The median amount of the fine was \$20,000, which is the minimum fine amount for individuals convicted of antitrust offenses recommended under USSG §2R1.1. Over the last decade, the fine amounts imposed on individual antitrust offenders ranged from a low of \$1,000 to a high of \$7,500,000. Most recently, for the first two quarters of FY 2009, the highest and lowest fine amounts imposed on the four individual antitrust offenders were \$50,000 and \$5,000, respectively.

All of the organizational antitrust offenders convicted in FY 2008 were required to pay a fine. Slightly over eleven percent of these convicted organizations were also required to pay restitution. By comparison, only 68.1 percent of all convicted organizations in FY 2008 were required to pay a fine and about one-third were required to pay restitution, as shown in **Figure 6** below.

³⁷ *Id.*

³⁸ 543 U.S. 220 (2005).

³⁹ USSG §B1.11 instructs the sentencing court to use the Guideline Manual in effect on the date that the offense of conviction was committed, if use of a Manual in effect on the date of sentencing would result in an *ex post facto* violation.

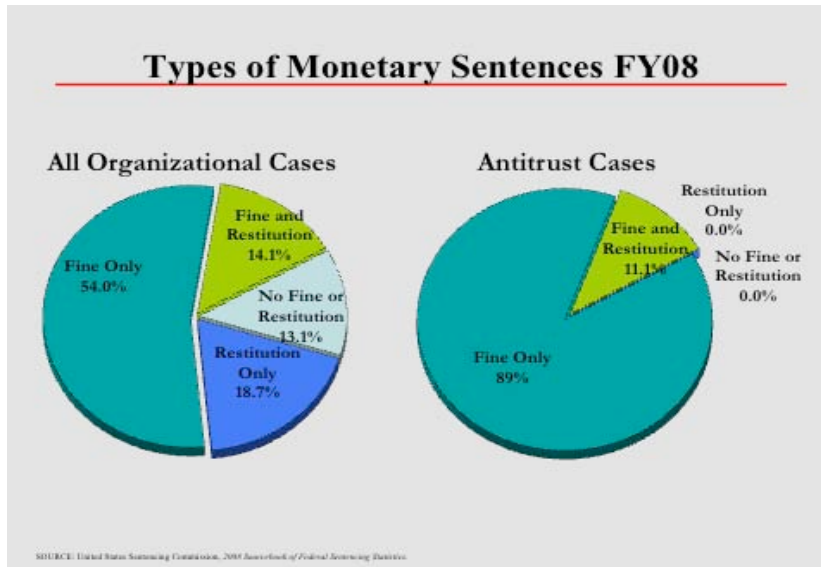


Figure 6. Types of Monetary Sentences Imposed On Organizations Convicted of Antitrust and other Offenses

The amounts of the fines imposed on organizational antitrust offenders have risen in the years after the statutory and concomitant antitrust guideline changes went into effect increasing the maximum fine amounts. For FY 1999 through FY 2004, the median fine for organizational antitrust offenders was \$550,000; for FY 2005 through FY 2008, the median fine tripled to \$1,721,000. Even though a fewer number of organizational antitrust offenders (a total of 9) were sentenced in FY 2008 than in some prior years, the largest median fines were imposed in FY 2008, as shown in **Figure 7** below. In FY 2008 alone, organizational antitrust offenders were fined an average amount of \$56,100,000, with the median value at \$42,000,000.

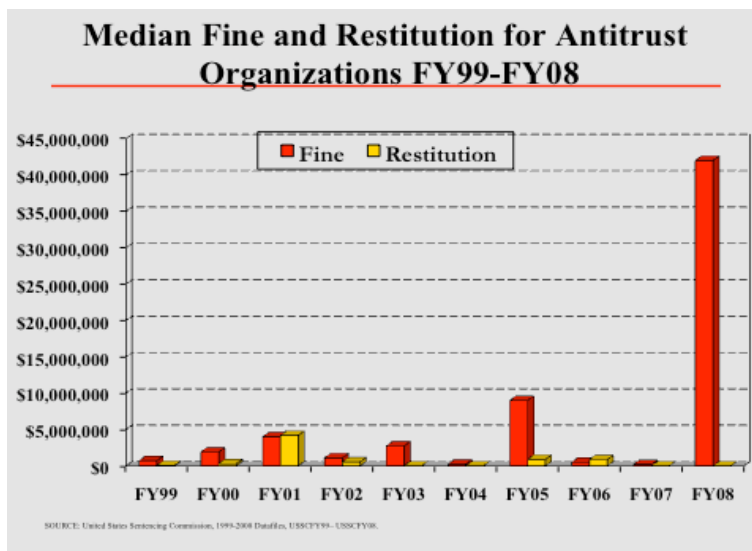


Figure 7. Median Fine and Restitution Amounts for Organizational Antitrust Offenders

Comparison of the fine amounts imposed on organizations for antitrust offenses compared to other significant offense types shows that the antitrust fines were by far the largest in FY 2008. As shown in **Figure 8** below, five out the ten largest fines, including the two highest fines, imposed on any organization for any offense in FY 2008 were for antitrust offenses. Indeed, as shown in **Figure 9** below, in FY 2008 the amounts of the antitrust fines far exceeded the median and average fine amounts imposed on organizations for other offense type.

Fines (in Millions)		Restitution (in Millions)	
Antitrust	\$210	Fraud	\$99
Antitrust	\$140	Fraud	\$78
Import/Export	\$110	Fraud	\$78
Antitrust	\$61	Fraud	\$78
Import/Export	\$60	Fraud	\$10
Antitrust	\$52	Fraud	\$9
Antitrust	\$42	Fraud	\$9
Bribery	\$19	Fraud	\$7
Fraud	\$15	Fraud	\$6
Fraud	\$8	Fraud	\$4

Figure 8. Largest Ten Fines/Restitution for Organizations by Offense Type

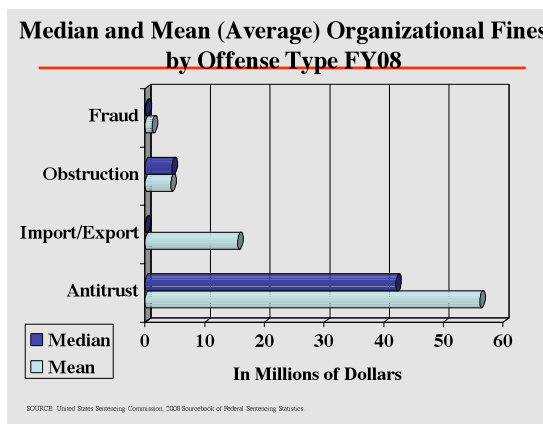


Figure 9. Comparison of Organizational Fines by Offense Type⁴⁰

4. Fine Adjustments for Organizations. Over the last decade, the majority of the organizations sentenced for antitrust offenses received no increases in their culpability scores for a prior history of criminal conduct under §8C2.5(c), violation of an order under §8C2.5(d), or obstruction of justice under §8C2.5(e).

Convicted organizations are able to reduce the amounts of the applicable fine under the guidelines by demonstrating that they (1) fully cooperated with the investigation, (2) affirmatively accepted responsibility for the criminal conduct, (3) reported the offense to appropriate governmental authorities prior to an imminent threat of disclosure and within a reasonably prompt time after becoming aware of the illegal activity, and (4) had in place at the time of the offense an effective compliance and ethics program.⁴¹ As shown in **Figure 10** below, while the percentages vary by year, overall during the last decade, a significant percentage of the organizations sentenced for antitrust offenses received average culpability score reductions for cooperation with the investigation (48.4%) or acceptance of responsibility (43.8%) under §8C2.5(g).

⁴⁰ The specific fine values reflected in **Figure 9** are: (1) Fraud, average fine \$1.6 million; median fine \$100,000; (2) Obstruction of justice, average fine \$4.3 million; median fine \$4.5 million; (3) Import/Export (e.g., violations of 50 U.S.C. §§ 1701-1706 (currency violations), 22 U.S.C. § 2778 (arms control violations), average fine \$15.5 million; median fine \$15,000; and (4) Antitrust, average fine \$56.1 million; median fine \$42 million.

⁴¹ USSG §8C2.5(f)&(g).

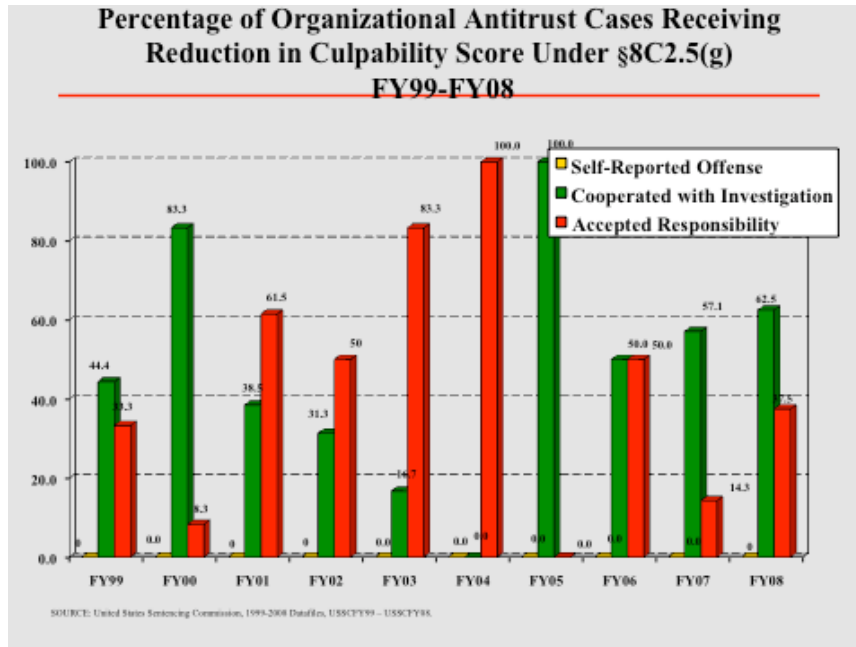


Figure 10. Reductions in Culpability Score for Organizational Antitrust Offenders

No organization convicted of antitrust offenses over the last decade received a reduction in its culpability score for self-reporting the illegal conduct. The Antitrust Division’s Leniency Program restricts the benefits made available under the program to the “first-in-the-door” company that applies for leniency and otherwise meets the eligibility requirements.⁴² This program, however, would not automatically eliminate the availability to other antitrust organizational offenders of an adjustment in the culpability score for self-reporting under §8C2.5(g)(1). For organizational cases across all offense types, the percentage of those receiving credit for self-reporting is similarly negligible, with a high of 4.5 percent in FY 2007; in most years the percentage is about 1 percent or less.

In addition, no organization sentenced for antitrust offenses over the last decade received culpability score reductions for having in place an effective compliance and ethics program under §8C2.5(f). Indeed, documentation for only a small proportion of organizations (7.2 percent) sentenced for antitrust offenses mentioned that the organization had any type of compliance program in place.⁴³

In the broader context of organizations convicted for all offense types, the lack of compliance program credit is not unusual. Since 1991, when the organizational guidelines in Chapter Eight of the Guidelines Manual went into effect, only three organizations have ever received a reduction in their culpability score for having in place

⁴² See Scott D. Hammond and Belinda A. Barnett, “Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters” (“FAQ”), November 19, 2008, available at <http://www.usdoj.gov/atr/public/criminal/leniency.htm>.

⁴³ Of the 123 organizational antitrust cases sentenced under the antitrust guidelines, two were excluded due to missing information.

an effective compliance program. The reasons for this negligible number of convicted organizations receiving compliance program credit may be three-fold. First, most convicted organizations (including organizational antitrust offenders as discussed in more detail below) are small organizations with fewer than 200 employees.⁴⁴ Small organizations generally have fewer resources and less formal operations than large organizations to dedicate to a robust compliance program.

Second, criminal investigations of organizations that have in place effective compliance programs may more often be resolved without criminal charges against the organization, including through a non- or deferred prosecution agreement.

Finally, even organizations that have in place effective compliance programs may be disqualified under §8C2.5(f) from receiving a reduction in their culpability score for having such a program in place. A significant automatic disqualifier for receiving compliance program credit applies when the organization, after becoming aware of an offense, unreasonably delays reporting the offense to appropriate governmental authorities.⁴⁵ Given the negligible number of self-reporting organizations convicted of antitrust offenses this disqualifier may contribute to the zero number of such organizations receiving compliance program credit.

An additional disqualifier applies if a “high-level” individual participated in, condoned, or was willfully ignorant of the offense. It is difficult to pinpoint exactly how many organizations overall or organizational antitrust offenders, in particular, may have been disqualified from receiving compliance program credit due to a high-level participant. The statistics show that from FY 2002 through FY 2008, close to half (48 percent) of the organizations convicted of antitrust offenses were charged along with individual co-defendants. Thirty-one percent of the individual co-defendants were high-level participants, including supervisors/managers, owners and board members, in the illegal activity, as shown in **Figure 11** below. These high-level individual co-defendants would likely have triggered the disqualification provision in the guidelines and bar credit for any compliance program credit.

⁴⁴ A “small organization” is defined as having fewer than 200 employees. USSG §8C2.5, comment. (n.1). For small organizations, high-level participation in the criminal activity is not an automatic disqualifier but instead establishes a rebuttable presumption that any extant compliance program was not effective. USSG §8C2.5 (f)(3)(B).

⁴⁵ USSG §8C2.5(f)(2).

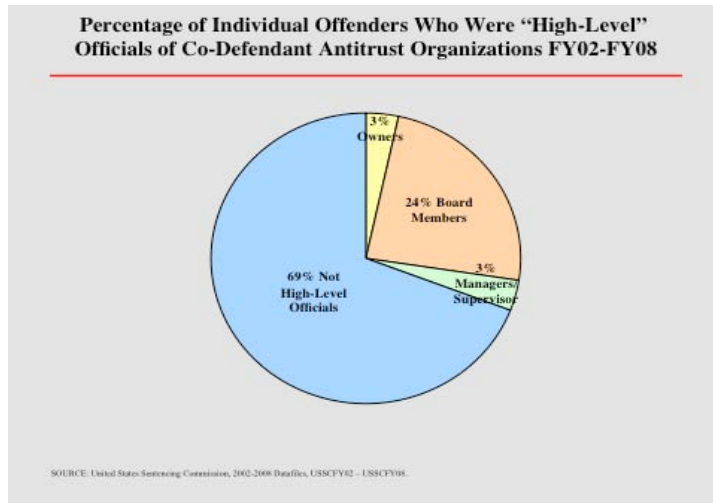


Figure 11. Percentage of High-Level Individual Co-defendants with Organizational Antitrust Offenders

Another statistical resource is available to evaluate the effect on the culpability scores of convicted organizations of high-level personnel’s participation in the illegal antitrust conduct, even when those employees are not charged as co-defendants or in separate cases. Over the last decade, from FY 1999 through FY 2008, the culpability scores of 87.8 percent of organizations convicted of antitrust offenses were increased due to the involvement or tolerance of the illegal activity by high-level or substantial authority personnel.⁴⁶ For comparison purposes, over the same period, 59.2 percent of organizations convicted of all offense types had culpability score increases under §8C2.5(b), due to the involvement in or tolerance of criminal activity by such senior level personnel.⁴⁷

5. Probation Terms. Probation for organizational defendants is authorized under the guidelines to ensure implementation of other sanctions, such as payment of a fine or restitution, and “that steps will be taken within the organization to reduce the likelihood of future criminal conduct.”⁴⁸ Consistently each year over the last decade, the majority (between 65.7% and 75.0%) of organizations convicted for all offense types had a probationary component to their sentence. By comparison, in six out of the last 10 years, fewer than half of the organizations convicted of antitrust offenses received probationary terms. From FY 1999 through FY 2008, organizational antitrust offenders were sentenced to probation in varying degrees, ranging from a high of 85.7 percent in FY 2004 to a low of 11 percent in FY 2008, as shown in **Figure 12** below.

⁴⁶ In computing this percentage, 23 organizational antitrust cases were excluded from the total of 143 due to missing guideline application information or a preliminary determination of inability to pay a fine, under USSG §8C2.2.

⁴⁷ In FY 2008 alone, 59.6 percent of the organizations convicted of all offense types had culpability score increases due to high-level personnel involvement in the offense. See U.S. Sentencing Commission, 2008 *Sourcebook of Federal Sentencing Statistics*, at Table 54.

⁴⁸ USSG Chapter Eight, Introductory Commentary.

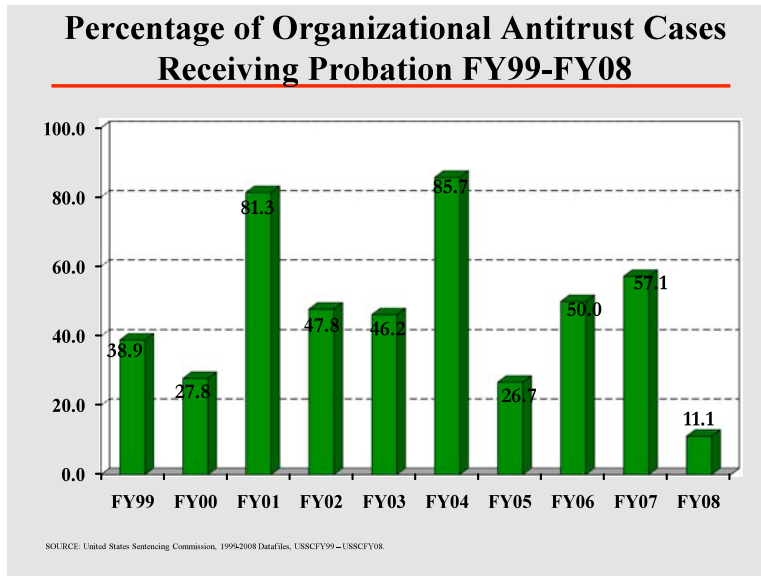


Figure 12. Percentage of Organizational Antitrust Offenders Receiving Probation

6. *Size of Organizational Antitrust Offenders.* The Commission collects data on the number of full-time employees for each offender organization. This information is typically reported in pre-sentence reports, but is missing in a number of cases. Nonetheless, from FY 2000 through FY 2008, out of the total of 70 organizational antitrust offenders, for which the number of full-time employees may be discerned from the documentation, the breakdown in the sizes of these organizations reveals that three-quarters (74.3 percent) are small, with fewer than 200 employees. Only about 15 percent of organizational antitrust offenders over the last decade were very large organizations with 1,000 or more employees, as summarized below.

- **11.4% of organizational antitrust offenders had 10 or fewer employees**
- **41.4% had 50 or fewer employees**
- **58.6% had 100 or fewer employees**
- **74.3% had 200 or fewer employees**
- **82.9% had 500 or fewer employees**
- **85.7% had 1,000 or fewer employees**

Although the total numbers of organizations convicted of antitrust offenses each year is relatively small, trends may still be discerned through tracking on a yearly basis the size of the organizational antitrust offenders. As shown in **Figure 13** below, small organizations (fewer than 200 employees) consistently each year make up the overwhelming majority of convicted antitrust organizations. When larger organizations are sentenced they are typically in the “200-500 employees” category or very large organizations (over 1,000 employees); very few sentenced organizations appear to be medium-sized (500-1,000 employees). Over the last 10 years, the number of very large (over 1,000 employees) organizations convicted of antitrust offenses appears to ebb on a

four-year cycle. Thus, for example, no very large organizations were sentenced under the antitrust guidelines in FY 2003 and 2007, following in each instance three prior years of some notable activity against large organizations. The reasons for this apparent cycle are unclear, but may be due to prosecutorial resource issues associated with different stages of criminal investigations.

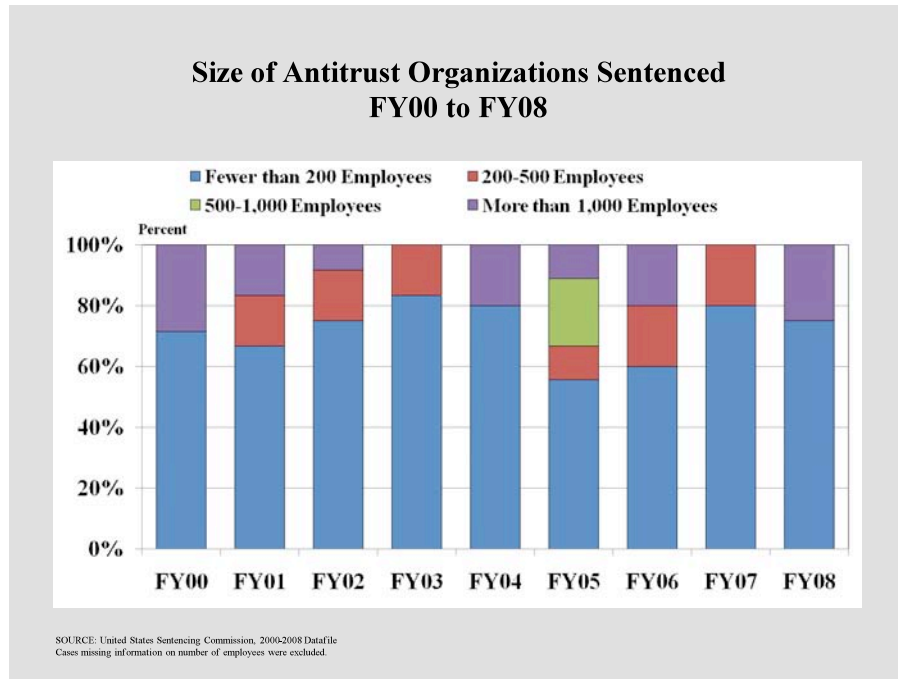


Figure 13. Breakdown of Size of Organizational Antitrust Offenders

Effect of Advisory Guidelines on Sentencing of Antitrust Offenders. No discussion of sentencing data and trends would be complete without reference to the Supreme Court’s *Booker* decision. In this landmark decision, the Court determined that mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. The Supreme Court then remedied this violation by excising the provisions of the Sentencing Reform Act that made the federal guidelines system mandatory. Consequently, the current federal guidelines system operates as an advisory system, but with calculation of the appropriate guideline range and consideration of the recommended guideline sentence required.⁴⁹

Under the advisory system, from January 12, 2005 (the date of issuance of the *Booker* decision by the Supreme Court) through June 30, 2009, the majority (60.2 percent) of all individual cases for all offense types (total of 323,765 individual cases) were sentenced within the recommended guideline range. About 1.6 percent of all individual cases were sentenced above the recommended guideline range; 25.0 percent were sentenced below the recommended range with a government-sponsored motion; and the remaining 13.2 percent were sentenced below the recommended range without a

⁴⁹ *Booker*, 543 U.S. at 264; *Rita v. United States*, 127 S. Ct 2456, 2465 (2007); *Gall v. United States*, 128 S. Ct. 586, 596 (2007). See also USSG, Ch. 1, Pt. A(2).

government-sponsored motion. By contrast, during this post-*Booker* period, only 13.8 percent of individual offenders sentenced under the antitrust guideline and convicted of a Sherman Act violation (a total of 58 cases with complete information) were sentenced within the recommended guideline range. A significantly higher percentage of these cases, at 72.4 percent, were sentenced below the recommended guideline range with a government-sponsored motion compared to all case types. The rate of below guideline sentences for individual antitrust offenders, absent a government-sponsored motion, was 13.8 percent.

Post-*Booker*, organizational antitrust offenders were sentenced within the recommended guideline range at a higher rate of 55.9 percent, than individual antitrust offenders. Moreover, the rates of below-guideline sentences, with a government-sponsored motion and without, at 35.3 percent and 8.8 percent, respectively, were lower than the rates for individual antitrust offenders.

The sentencing statistics relative to the guideline range for individual antitrust offenders is markedly different under the current advisory system from when the guidelines were mandatory.⁵⁰ From FY 1999 through FY 2005,⁵¹ under the mandatory guideline system, within guideline range sentences were imposed in 46.2 percent of the individual antitrust cases (total of 132 individual cases with complete information), or more than triple the rate under the advisory system. In addition, under the mandatory system for the same time period, the rate of below-guideline sentences with a government-sponsored substantial assistance motion was 34.1 percent of the cases – or more than half the current rate under the advisory system. The rate of other below-guideline sentences for individual antitrust offenders, absent a government-sponsored substantial assistance motion, was 19.7 percent under the mandatory system. Since the increased statutory and guideline penalties for antitrust offenders became effective at around the same time as the *Booker* decision, it is difficult to parse out without additional research the factors that may be contributing to the statistical changes in sentences relative to the guideline range.

Review of sentencing data in antitrust cases can help reveal practices and trends in enforcement and penalties. In sum, over the last decade, median prison terms for individual antitrust offenders has fluctuated but not exceeded one year, despite substantial increases in both statutory and guideline penalties for antitrust violations during this time period. By contrast, median fines imposed on organizational antitrust offenders dramatically increased in FY 2008, although it remains unclear whether this was an anomalous year or the mark of a new trend.

⁵⁰ The sentencing statistics relative to the guideline range for organizational antitrust offenders under the mandatory system are not as dramatically different under the advisory system as for individual antitrust offenders. For example, under the mandatory system, from FY 1999 through FY 2005, within guideline range sentences were imposed on 65.6 percent of organizational antitrust offenders; below guideline range sentences with a government-sponsored substantial assistance motion and without, were imposed at rates of 22.2 percent and 11.1 percent, respectively.

⁵¹ Since *Booker* was decided in the beginning of the second quarter of FY 2005, the pre-*Booker* mandatory time period covers FY 1999 through January 11, 2005.