



MEMORANDUM

From: Criminal Study Group
To: All Commissioners
cc: Andrew J. Heimert and Commission Staff
Date: July 22, 2005
Re: Criminal Study Plan

Issue Proposed for Study by the Commission

Should the statutes and guidelines establishing criminal fines for price fixing and related offenses be amended in light of the Supreme Court's decision in *Booker* and other developments?¹

Questions for Public Comment

1. In setting corporate fines for criminal Sherman Act violations, should there be a means for differentiation based on differences in the severity or culpability of the behavior?
 - A. Do the Sentencing Guidelines provide an adequate method of distinguishing between violations with differing degrees of culpability? For example, should the Sentencing Guidelines provide distinctions between different types of antitrust crimes (*e.g.*, price fixing versus monopolization)?
 - B. The Sentencing Guidelines use 20% of the volume of commerce affected as the basic method of distinguishing the severity of antitrust violations. *See* United States Sentencing Commission, *Guidelines Manual* § 2R1.1 (2004). Does the volume of commerce provide an adequate measure for distinguishing the severity of offenses? If not, what other measure(s) would provide a more appropriate method for the Guidelines to distinguish the severity of violations?
2. The Sherman Act provides for a maximum fine of \$100 million (or, previously, \$10 million). The government may seek criminal fines in excess of that maximum pursuant to 18 U.S.C. § 3571(d).
 - A. Should "twice the gross gain or twice the gross loss" as provided in Section 3571(d) be calculated based on the gain or loss from all coconspirator sales or on only the defendant's sales?

¹ The Commission adopted for study at its January 13, 2005, meeting the following issue: "Should the statutes establishing criminal fines for price fixing and related offenses be amended in light of recent Supreme Court decisions casting doubt on the status of the Federal Sentencing Guidelines?" The Criminal Study Group proposes that the question for study be amended as set forth above.

- B. Should fines above the statutory maximum, and thus limited by Section 3571(d), be based on 20% of gross sales as provided for in the Sentencing Guidelines, as they are for fines below the statutory maximum, or should they be calculated differently? If differently, how should they be calculated?

Hearings

- One panel of approximately two hours.
- 1. Criminal Antitrust Fines and Sentencing
 - DOJ representative (Criminal Antitrust DAAG, Criminal AAG, or designee)
 - U.S. Sentencing Commission representative
 - Practitioner(s) with criminal-defense experience