



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 23, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find attached responses to questions arising from the December 5, 2006, appearance before the Committee of Associate Deputy Attorney General Ronald J. Tenpas at a hearing entitled "Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity." We hope that this information is helpful to the Committee.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, reading "Richard A. Hertling", is positioned below the word "Sincerely,".

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

**“Examining Enforcement of Criminal Insider Trading and
Hedge Fund Activity”
Senate Judiciary Committee
December 5, 2006**

Questions for Associate Deputy Attorney General Ronald J. Tenpas

Questions posed by Senator Specter

- 1. Congress enacted 18 U.S.C. sec. 1348 in 2002, after that amendment was reported out of the Judiciary Committee. How many indictments have there been under that statute? How many of those involve unlawful insider trading?**

The cases that have been charged under 18 U.S.C. Section 1348 were identified in an attachment to a Question for the Record Response that the Department of Justice submitted to the Senate Judiciary Committee on December 14, 2006, as a follow-up to the Committee's hearing on September 26, 2006. For ease of reference, a copy of that attachment is included again herewith. Of all those charged under Section 1348, sixteen cases involved allegations that a defendant engaged in insider trading.

- 2. Did the Department of Justice suggest a term of 3 years probation in connection with the 11/30/06 sentencing of hedge fund manager, Michael Tom, for trading on a tip that Citizens Bank would be acquiring Charter One Financial?**

The United States did not suggest a probationary term for Michael Tom. Rather, the United States strongly opposed a probationary term and, instead, argued in favor of a term of imprisonment of thirty-seven months in light of Mr. Tom's conduct. That conduct included, by Mr. Tom's own admission in his plea agreement, that he attempted to obstruct the investigation. The facts revealed that he created back-dated and fraudulent documents related to Ms. Wang's (a co-conspirator) investment in Mr. Tom's fund in order to hide his ties to Ms. Wang, provided this fraudulent document to the SEC, attempted to improperly coordinate witness testimony, and testified falsely before the SEC in accordance with that plan. The government's suggested sentence was at the low end of the relevant sentencing guideline range determined by the Court to apply and which the parties agreed applied. Despite its guideline determination, the Court chose to impose a sentence of three years probation, the first six of which are to be served while the defendant is in a community confinement center.

In announcing its decision to impose only a probationary sentence on Mr. Tom, the Court relied, among other things, on the fact that Ms. Wang -- a defendant who cooperated, was less culpable, and enjoyed a far smaller financial benefit -- had received a probationary sentence and that Mr. Tom was likely to be fined by the SEC in its parallel civil proceeding. The United States disputed these factors as sufficient justifications for the probationary sentence. It is only the new-found discretion

afforded courts by the Supreme Court's Booker decision that made such a sentence possible and the case presents a powerful example of why a return to a mandatory sentencing guideline system is necessary.

3. Are bounty programs effective tools in detecting and prosecuting tax fraud and False Claims Act fraud? You mention concern about bounties in a criminal context, but tax fraud and government fraud often involve criminal penalties. Please explain whether your concern about bounties for unlawful insider trading prosecutions would be different than what it would be in the context of tax or government fraud.

Bounty programs can, in certain circumstances, be effective tools. The question notes two areas where financial incentives to report misconduct have resulted in private citizens reporting misconduct, which in turn has led to effective government enforcement actions. Both the tax and False Claims Act contexts differ from insider trading, however, in that tax violations and false claims to the government are often apparent to individuals who have not participated in the actual violation. For example, a low level company official may be aware of company billing practices that result in false claims being submitted to the government, even when that individual is not personally responsible for preparing or submitting those billings. Insider trading, however, tends to be conducted among a secretive and small group, who closely guard their activities. Thus, as to insider trading, the most likely sources of "tip" information are those who were directly engaged in the wrong-doing. The SEC's experience to date with offering rewards to those who report insider trading is instructive. As the SEC explained in its testimony, its program has produced very limited results, which is unsurprising given the nature of insider trading.

Because false claims and tax "bounty" programs do produce effective results in certain situations, it is worth suffering some of the ancillary consequences such programs may have for parallel criminal investigations, most notably, that witnesses involved in the criminal case can be impeached with the fact that the possibility of a "bounty" gives the witness an incentive to lie or shade the facts. As to insider trading, however, because there is not likely to be a large number of cases produced through offering a bounty, we doubt that it is worthwhile to create such a statutory scheme, with its related complications for witness impeachment. Even if not used, the existence of such a statutory scheme would potentially subject witnesses to impeachment on this issue, as we expect in trial such a statutory change would likely open the door to defense counsel questions about a witness's financial incentives, even if that witness did not appear to be a "tipster" qualifying for a bounty.

- 4. You mention concern that eliminating the "duty" requirement may subject to criminal sanctions "those who innocently come by valuable information and trade on it." Could the requirement of proof of scienter and willfulness address that concern? Even if "innocently" obtained, if someone is given information**

that is material and non-public, is it preferable to have clarity as to whether the person may trade on that information?

Such a *scienter* requirement would help to narrow the risk that those who innocently come by information and trade on it would be criminally prosecuted, but may not be sufficient to fully address the consequences of eliminating the “duty” element. Clarity in legal regimes is always desirable. The current “duty” requirement helps to provide such clarity because it gives a person who trades on information a greater level of confidence that that they can legally do so – a trader can be confident that so long as he or she does not enjoy a fiduciary relationship to the information (either directly or inherited through a third party who provided the information), such information may safely form the basis for trading. So, for example, the duty requirement may reassure a member of the public that he or she can safely trade when the person simply overhears information in an elevator or on the street or receives information from a friend whose information source is unclear, or if the trader otherwise conducts legitimate research that may involve contact with those who have a relationship with the company. Such a trader, whether an individual or institutional investor, may lack the confidence to trade if the only defense available is that the trading was not “knowingly” reliant on insider information. In sum, the more limited the legal requirements are for proving insider trading, the more likely it is that investors will be chilled from trading for fear that they will later be subject to prosecution. Discouraging legitimate trading is a cost that must be born in mind when considering any change to the current legal requirements.

CRIMINAL CASELOAD STATISTICS
DETAIL RECORDS OF TITLE 18 USC 1348
ALL CHARGES AND NO APPEALS

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DATE	DEFENDANT	CRIME/CHARGE	ARREST	RESULT	REASON	QUEST	SENT
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DATE	DEFENDANT NAME	COURT	JUDGE	FILED	CHARGE	DUS DT	RESULT	REASON	INQ DT	SENTENCE
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01/02/2010	JANE SMITH	CLERK OF COURT	JUDGE	12346	TRAFFIC VIOLATION	01/02/2010	NOTED	NO VIOLATION	01/02/2010	NO ACTION
01/03/2010	JOHN DOE	CLERK OF COURT	JUDGE	12347	TRAFFIC VIOLATION	01/03/2010	NOTED	NO VIOLATION	01/03/2010	NO ACTION
01/04/2010	JANE SMITH	CLERK OF COURT	JUDGE	12348	TRAFFIC VIOLATION	01/04/2010	NOTED	NO VIOLATION	01/04/2010	NO ACTION
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01/06/2010	JANE SMITH	CLERK OF COURT	JUDGE	12350	TRAFFIC VIOLATION	01/06/2010	NOTED	NO VIOLATION	01/06/2010	NO ACTION
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01/08/2010	JANE SMITH	CLERK OF COURT	JUDGE	12352	TRAFFIC VIOLATION	01/08/2010	NOTED	NO VIOLATION	01/08/2010	NO ACTION
01/09/2010	JOHN DOE	CLERK OF COURT	JUDGE	12353	TRAFFIC VIOLATION	01/09/2010	NOTED	NO VIOLATION	01/09/2010	NO ACTION
01/10/2010	JANE SMITH	CLERK OF COURT	JUDGE	12354	TRAFFIC VIOLATION	01/10/2010	NOTED	NO VIOLATION	01/10/2010	NO ACTION
01/11/2010	JOHN DOE	CLERK OF COURT	JUDGE	12355	TRAFFIC VIOLATION	01/11/2010	NOTED	NO VIOLATION	01/11/2010	NO ACTION
01/12/2010	JANE SMITH	CLERK OF COURT	JUDGE	12356	TRAFFIC VIOLATION	01/12/2010	NOTED	NO VIOLATION	01/12/2010	NO ACTION
01/13/2010	JOHN DOE	CLERK OF COURT	JUDGE	12357	TRAFFIC VIOLATION	01/13/2010	NOTED	NO VIOLATION	01/13/2010	NO ACTION
01/14/2010	JANE SMITH	CLERK OF COURT	JUDGE	12358	TRAFFIC VIOLATION	01/14/2010	NOTED	NO VIOLATION	01/14/2010	NO ACTION
01/15/2010	JOHN DOE	CLERK OF COURT	JUDGE	12359	TRAFFIC VIOLATION	01/15/2010	NOTED	NO VIOLATION	01/15/2010	NO ACTION
01/16/2010	JANE SMITH	CLERK OF COURT	JUDGE	12360	TRAFFIC VIOLATION	01/16/2010	NOTED	NO VIOLATION	01/16/2010	NO ACTION
01/17/2010	JOHN DOE	CLERK OF COURT	JUDGE	12361	TRAFFIC VIOLATION	01/17/2010	NOTED	NO VIOLATION	01/17/2010	NO ACTION
01/18/2010	JANE SMITH	CLERK OF COURT	JUDGE	12362	TRAFFIC VIOLATION	01/18/2010	NOTED	NO VIOLATION	01/18/2010	NO ACTION
01/19/2010	JOHN DOE	CLERK OF COURT	JUDGE	12363	TRAFFIC VIOLATION	01/19/2010	NOTED	NO VIOLATION	01/19/2010	NO ACTION
01/20/2010	JANE SMITH	CLERK OF COURT	JUDGE	12364	TRAFFIC VIOLATION	01/20/2010	NOTED	NO VIOLATION	01/20/2010	NO ACTION
01/21/2010	JOHN DOE	CLERK OF COURT	JUDGE	12365	TRAFFIC VIOLATION	01/21/2010	NOTED	NO VIOLATION	01/21/2010	NO ACTION
01/22/2010	JANE SMITH	CLERK OF COURT	JUDGE	12366	TRAFFIC VIOLATION	01/22/2010	NOTED	NO VIOLATION	01/22/2010	NO ACTION
01/23/2010	JOHN DOE	CLERK OF COURT	JUDGE	12367	TRAFFIC VIOLATION	01/23/2010	NOTED	NO VIOLATION	01/23/2010	NO ACTION
01/24/2010	JANE SMITH	CLERK OF COURT	JUDGE	12368	TRAFFIC VIOLATION	01/24/2010	NOTED	NO VIOLATION	01/24/2010	NO ACTION
01/25/2010	JOHN DOE	CLERK OF COURT	JUDGE	12369	TRAFFIC VIOLATION	01/25/2010	NOTED	NO VIOLATION	01/25/2010	NO ACTION
01/26/2010	JANE SMITH	CLERK OF COURT	JUDGE	12370	TRAFFIC VIOLATION	01/26/2010	NOTED	NO VIOLATION	01/26/2010	NO ACTION
01/27/2010	JOHN DOE	CLERK OF COURT	JUDGE	12371	TRAFFIC VIOLATION	01/27/2010	NOTED	NO VIOLATION	01/27/2010	NO ACTION
01/28/2010	JANE SMITH	CLERK OF COURT	JUDGE	12372	TRAFFIC VIOLATION	01/28/2010	NOTED	NO VIOLATION	01/28/2010	NO ACTION
01/29/2010	JOHN DOE	CLERK OF COURT	JUDGE	12373	TRAFFIC VIOLATION	01/29/2010	NOTED	NO VIOLATION	01/29/2010	NO ACTION
01/30/2010	JANE SMITH	CLERK OF COURT	JUDGE	12374	TRAFFIC VIOLATION	01/30/2010	NOTED	NO VIOLATION	01/30/2010	NO ACTION
01/31/2010	JOHN DOE	CLERK OF COURT	JUDGE	12375						

NYE					18:01001a2
NYE					18:01348
NYE					18:01349
NYE					18:01512b1
NYE					18:01512b2a
NYE					18:01512b3
NYE					18:01512k
NYE					18:01952a3
NYE					18:03551
NYE					21:00853p
NYE					28:02461c
NYE	Coughlin, Paul F.	DC	MAA	050818	18:00002
NYE					18:00002
NYE					18:00371
NYE					18:00981a1C
NYE					18:01001a1
NYE					18:01001a2
NYE					18:01348
NYE					18:01349
NYE					18:01512b1
NYE					18:01512b2A
NYE					18:01512b3
NYE					18:01512k
NYE					18:01952a3
NYE					18:03551
NYE					21:00853p
NYE					28:02461
NYE	Deakins, William B.	DC	MAA	050818	18:00002
NYE					18:00002
NYE					18:00371
NYE					18:00981a1C
NYE					18:01001a1
NYE					18:01001a2
NYE					18:01348

RENDANT NAME, DOB, SEX, RACE, ETHNICITY, RELIGION, S...

NYE					18 :01349
NYE					18 :01512b1
NYE					18 :01512b2A
NYE					18 :01512b3
NYE					18 :01512k
NYE					18 :01952a3
NYE					18 :03551
NYE					21 :00853p
NYE					28 :02461
NYE	Alexander, Jacob	DC	IJ	060928	15 :00078
NYE					15 :00078
NYE					18 :00002
NYE					18 :00371
NYE					18 :00981
NYE					18 :00982
NYE					18 :01341
NYE					18 :01343
NYE					18 :01348
NYE					18 :01956
NYE					18 :01957
NYE					18 :03551
NYE					21 :00853
NYE					28 :02461
NYE	Mitchell, Brian Robert	DC	TYH	060424	18 :01348
NYE					18 :01348
NYS	Colon, Filiberto	DC	SM2	040109	18 :00371
NYS					18 :00371
NYS					18 :01341
NYS					18 :01348
NYS					18 :01349
NYS	Colon, Luis	DC	SM2	040109	18 :01341
NYS					18 :00371
NYS					18 :01341
NYS					18 :01348

NYS					18 :01349						
NYS	Pianello, Adam	DC	SM2	040109	18 :01341						
NYS					18 :00371						
NYS					18 :01341						
NYS					18 :01348						
NYS					18 :01349						
OHN	Wilson, Peter	DC	JJR	041118	18 :01001						
OHN					18 :01001						
OHN					18 :01348						
OKW	Cooper, Adrian	DC	SW	051117	18 :01348	060327	GT	PLED	060920	75	
OKW					18 :01341	060327	DM	GWOD	060920		
OKW					18 :01343	060327	DM	GWOD	060920		
OKW					18 :01348	060327	GT	PLED	060920		
OKW					18 :01956	060327	DM	GWOD	060920		
OKW					18 :01957	060327	GT	PLED	060920		
OKW					42 :00408	060327	DM	GWOD	060920		
PR	Soto-Cruz, Carlos H.	DC	JDN	040412	18 :01341	041008	GT	PLED	050818		
PR					18 :01341	041008	GT	PLED	050818	144	
PR					18 :01343	041008	DM	GWOD	050818		
PR					18 :01348	041008	GT	PLED	050818		
SD	Byrd, Diane	DC	RAM	041216	18 :01348	050420	GT	PLED	050727	10	
SD					18 :01344	050420	DM	GWOD	050727		
SD					18 :01348	050509	GT	PLED	050727		
TXN	Wannamaker, John	DC	LH	050720	18 :00371	050504	GT	PLED	061025	110	
TXN					18 :00371	050504	GT	PLED	061025		
TXN					18 :01343	060919	GT	PLED	061025		
TXN					18 :01348	060919	GT	PLED	061025		
TXN					18 :01956	060919	GT	PLED	061025		
TXN					18 :01957	060919	GT	PLED	061025		
TXN	Price, Patrick	DC	LH	050720	18 :00371	060717	DM	GWOD	061108		
TXN					18 :00371	060717	DM	GWOD	061108		
TXN					18 :01343	060717	DM	GWOD	061108		
TXN					18 :01348	060717	GT	PLED	061108	36	Probation
TXN	Saporta, Nancy	DC	LH	050720	18 :00371	060717	GT	PLED	061108	42	Probation

TXN					18 :00371	060717	DM	GWOD		
TXN					18 :01343	060717	GT	PLED		
TXN					18 :01348	060717	GT	PLED		
UT	Weeks, Kenneth L.	DC	GCD	050415	18 :01348	051115	GT	PLED	60831	7
UT					18 :01348	051115	DM	GWOD		

* Caseload data extracted from the United States Attorneys' Case Management System

**Kenneth Weeks is listed twice as a defendant but counted only once. Mr. Weeks, a defendant in the Eastern District of New York, was transferred to the District of Utah

Disposition Codes:

DM: dismissed without prejudice

GT: guilty

NG: not guilty

TR: Transfer from district (Rule 20, 21)

Disposition Reason:

DEMD: by defense motion (district court)

GWDD: by government from district court with DOJ authorization

GWOD: by government from district court with no DOJ authorization

JTRD: jury trial verdict (district court)

PLED: Plea (district court)

RTWD: Rule 20 (district court)

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