

PREPARED STATEMENT

OF

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BEFORE

THE UNITED STATES SENTENCING COMMISSION

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Good morning, Chairman Hinojosa and Commissioners. It is my pleasure today to talk to you about the problem of disaster-related fraud, and to discuss the Department of Justice's views with regard to the proposal to amend section 2B1.1 of the Guidelines concerning disaster-related fraud.

As you know, the Commission recently promulgated an emergency amendment in response to the passage of the "Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007," Public Law 110-179. We commend the Commission for its prompt response to this legislation and for its recognition of the serious harms posed by disaster assistance fraud. The emergency amendment appropriately adds a two-level increase to the base offense level found at § 2B1.1(a) "[i]f the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency" We ask that the Commission re-promulgate this special offense characteristic on a permanent basis and provide for a base offense of at least 14 under section 2B1.1(a) for any disaster related fraud.

The Act is aimed at assuring increased punishment for those involved in illegally siphoning off money that was intended for disaster recovery because, "[d]espite efforts by federal, State and local law enforcement to prosecute emergency and disaster benefits schemes wherever and whenever they occur, it persists."¹ Congress explained that "[t]he goal of the bill is to protect the real victims of disasters like Hurricane Katrina by specifically making it a crime under the existing fraud chapter of title 18 (18 U.S.C. Sec. 1001-1039) to fraudulently obtain

¹ *S. Rep. 110-69, at 3 (2007).*

emergency disaster funds.”² The comments of Senator Sessions in the Senate Report make clear that Congress intended both to increase punishments for the perpetrators of this fraud and to send a strong message to deter other would-be fraudsters:

The fact is, some people think in a disaster they can run in and make any kind of bogus claim they desire--that money will be given to them and people will be too busy to check. And if they do, nothing is ever going to happen to them. We need to completely reverse that mentality. We need to create a mindset on the part of everybody that these disaster relief funds are sacred; that they are for the benefit of people who have suffered loss, and only people who have suffered loss should gain benefit of it. We need to make it clear that those who steal that money are going to be prosecuted more vigorously and punished more severely than somebody who commits some other kind of crime because I think it is worse to steal from the generosity of the American people who intended to help those in need. *Id. at 4-5.*

With this understanding of the legislative purpose behind the new law, let me begin by talking about the Department’s recent experience in responding to the aftermath of Hurricanes Katrina, Rita, and Wilma from the summer and fall of 2005. Although the Department has had substantial experience over the years in prosecuting fraud stemming from natural and man-made disasters – ranging from Gulf Coast hurricanes to the 9-11 terrorist attacks and the recent California wildfires – the three hurricanes in 2005 caused unprecedented levels of devastation and disruption of people’s lives. As you may recall, Hurricane Katrina was the largest natural disaster ever to affect the United States. Hundreds of thousands of people were displaced, hundreds of thousands of homes and other housing units were destroyed or damaged, and residents suffered tens of billions of dollars in losses because of storm damage.³ As of August

² *Id. at 4.*

³H URRICANE KATRINA FRAUD TASK FORCE, U.S. DEP’T OF JUSTICE, SECOND-YEAR REPORT TO THE ATTORNEY GENERAL at 1 (September 2007), *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/docs/09-04-07AG2ndyrprogrpt.pdf.

17, 2006, the Federal Emergency Management Agency (FEMA) had received more than 2.5 million applications for disaster assistance relating to Hurricanes Katrina and Rita.⁴

This unprecedented level of devastation caused substantial, widespread, and immediate needs for emergency assistance from public- and private-sector agencies, and for long-term commitments of funds to remove vast quantities of debris and to rebuild critical infrastructure, homes, and other facilities throughout the Gulf Coast region. Although FEMA has already provided more than \$8.3 billion in public-assistance grants,⁵ tens of billions of dollars more will continue to be provided to the Gulf Coast states for years to come.

Because of the Department of Justice's substantial experience in investigating and prosecuting fraud stemming from previous natural disasters and from the 9-11 attacks, in September 2005 then Attorney General Alberto Gonzales established the Hurricane Katrina Fraud Task Force. As of January 22, 2008, the Task Force had indicted 843 defendants in 42 judicial districts. The crimes charged in these cases reflect the six types of crime on which the Task Force has focused: fraudulent charitable solicitations; fraudulent applications for public and private emergency-assistance benefits; identity theft; insurance fraud; government-contract and procurement fraud; and public corruption.⁶

In order to coordinate this massive, multi-jurisdictional effort, the Task Force established a Joint Command Center in Baton Rouge, Louisiana. This Joint Command Center has brought

⁴ *Id.*

⁵ See FEMA, Press Release (August 24, 2007), available at <http://www.fema.gov/news/newsrelease.fema?id=39209>.

⁶ H URRICANE KATRINA FRAUD TASK FORCE, *supra* note 1, at 2.

together federal investigative agencies, federal Inspectors General, and multiple components of the Department of Justice to receive, screen and refer disaster-fraud complaints to law enforcement field offices around the country.

A sampling of the Task Force's prosecutions, however, will show that sentences in disaster-fraud prosecutions vary widely, not only in simple, single-application fraud cases but also in cases involving substantial and sophisticated schemes. Generally, in our experience, first-time offenders who committed a disaster fraud-related offense have received sentences of probation and a fine equivalent to the amount of disaster assistance funds that they fraudulently obtained.⁷ For example in the Eastern District of California, which handles the cases involving the Red Cross Bakersfield call center and Katrina fraud, of 75 defendants indicted, 71 pled and 4 are fugitives. Thirty-nine (52% of all defendants) received sentences of probation. Only 6 defendants (8 percent) received sentences of more than 1 year.⁸

We believe, however, that there is a need to seek higher sentences in disaster-fraud cases, based on our experience with the Katrina Fraud Task Force and Congress's intent – as reflected in the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007 (Act) -- to

⁷ See, e.g., United States Attorney's Office, Middle District of Louisiana, Press Release (January 25, 2008), *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2008/jan/01-25-08lewis-whitaker-sent.pdf; United States Attorney's Office, Eastern District of Texas, Press Release (September 4, 2007), *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2007/sep/09-04-07turner-indict.pdf;

⁸ The remainder of the convicted defendants (26, or 34.7%) received the following sentences: 3 were sentenced to 1 month or less; 1 to 2 months or less; 1 to 3 months or less: 12 to 4 months or less; 2 to 5 months or less: 1 to 6 months or less: 1 to 8 months or less: 4 to 9 months or less: and 1 to 10 months or less.

establish higher maximum terms of imprisonment in several categories of disaster-related fraud.

The fundamental reason for imposing higher sentences in disaster-fraud prosecutions is that disaster fraud, simply put, is different in several respects from other types of government benefit-related fraud. The primary difference is a result of the environment in which disaster relief must be distributed. Often, the affected area is devastated, communications and essential services are destroyed and residents are forced out of their homes and evacuated to remote locations. Many leave with little more than the clothes on their back. These victims need immediate assistance to obtain even basic necessities, such as food and shelter.

In the case of Hurricane Katrina, hundreds of thousands of residents of the affected area were, quite literally, forced to relocate to every state in the nation. The disaster relief agencies could not require each applicant to appear in person with the documentation needed to confirm the applicant's entitlement to benefits. Applications were received and processed by telephone and over the internet with a great urgency to provide immediate relief to displaced persons in dire need of assistance. These circumstances make both the disaster relief agencies and the victims they serve uniquely vulnerable to fraud.

That fraud routinely causes two types of immediate harm: (1) to the agencies disbursing the funds, by depriving them of funds that should be disbursed to legitimate victims; and (2) to those legitimate victims, who may be in dire need of funds to which they are entitled to pay for food and lodging but are unable to receive them at the very time when they need those funds most desperately. Every emergency-assistance check or payment card that criminals obtain through fraud takes money away from those agencies and, by extension, from the true victims of the disaster. Unlike conventional frauds involving routine government benefits, where the harm

from fraudulent applications is generally dispersed over time and not particularly visible in its effects, disaster fraud schemes can cause immense and widespread harm in a short span of time.

Second, we believe that as disaster fraud becomes more publicly visible, it inevitably has a damaging effect on the willingness of potential contributors to relief organizations such as the American Red Cross to make future donations to those organizations. Even when they make substantial efforts to reduce the risks of fraud, disaster-relief organizations may be unfairly tarred with the same brush that members of the public may use to criticize the criminals who divert those agencies' funds for their own personal profit. The Department believes that the Commission should take into account this aggregate harm on charitable giving, as well as the individual harm caused by particular defendants, in deciding what kind of sentencing enhancement it may choose to adopt on a permanent basis.

For these reasons, the Department of Justice believes that a strong deterrent is needed to protect disaster relief agencies, disaster victims and the public. The Department of Justice favors both the two-level disaster fraud enhancement that the Commission has already adopted for section 2B1.1 of the Guidelines and a floor of level 14 for disaster-related fraud under section 2B1.1. By establishing a level 14 floor, section 2B1.1 would ensure that even first-time offenders in disaster-fraud cases will receive a term of imprisonment that falls within Zone D unless they plead guilty and demonstrate their acceptance of responsibility. The level 14 floor would also provide a substantial deterrent effect, by making clear that even relatively small disaster fraud schemes can result in a real risk of imprisonment.

A level 14 floor is commensurate with other provisions included in 2B1.1. For example, single acts of fraud committed during bankruptcy proceedings or involving financial assistance

for certain student loans are set a minimum level of 10;⁹ if a substantial part of the scheme was committed outside of the United States the minimum level is 12;¹⁰ and if the fraud involved an organized scheme to steal vehicles or their parts or goods from a cargo shipment the minimum offense level is 14.¹¹ Certainly stealing emergency aide to those who are already suffering is at least as serious, if not more, than these offenses. Indeed, one could argue that the concerns expressed in U.S.S.G. § 2B1.1(b)(13)(B), which assign a floor of 24 for offenses that jeopardize the financial soundness or solvency of an organization, are similar to those noted by Congress in passing the “Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007.” The current relatively light punishment imposed for disaster fraud encourages the belief that the potential benefits from such fraud far outweigh any possible punishment. The continued widespread fraud that we saw after Katrina and the other disasters can jeopardize relief agencies both in their ability to raise future funds and in their ability to provide adequate aide to those in need.

In establishing a floor, we submit that the Commission should be guided, at least in part, by Congress’ decision to establish a maximum term of imprisonment for these offenses of 30 years. That maximum reflects Congress’ concern about the impact of these violations on relief efforts and on the ability to raise future funding from voluntary contributions. The 30 year maximum far exceeds the maximum penalties for other offenses that the Commission has previously determined should receive a minimum base offense level. For example, section

⁹ U.S.S.G. § 2B1.1(b)(8).

¹⁰ U.S.S.G. § 2B1.1(b)(9)(B).

¹¹ U.S.S.G. § 2B1.1(b)(11)

2B1.1(b)(11) establishes a floor of 14 for violations of 18 U.S.C. § 659 (Theft from Interstate Shipments); § 2312 (Transportation of Stolen Vehicles) and § 2321 (Trafficking in Stolen Motor Vehicle or Parts) when those offenses carry a maximum of only 10 years. Similarly section 2B1.1(b)(10) establishes a floor of 12 for violations involving access devices and authentication features, offenses for which the maximum punishment is generally 10, 15 or 20 years. See 18 U.S.C. §§ 1028, 1029. In fact, the two types of offenses that the Commission has determined should have floors of 24 have maximum punishments either less than¹² or at 30 years.¹³ Using these criteria, we submit that a floor of level 14 is the minimum that would adequately reflect the serious punishment that Congress felt appropriate and be commensurate with other offenses found in 2B1.1.

We also recommend that the Commission add a new subdivision (IV) to Application Note 3(A)(v) of Section 2B1.1 as follows:

“(IV) *Disaster Fraud Cases.* In the case of a fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191), reasonably foreseeable pecuniary harm includes the reasonably foreseeable

¹² See U.S.S.G. § 2B1.1(b)(14). The only time that 18 U.S.C. § 1030 carries a maximum penalty greater than 20 years is in those cases where the defendant “knowingly or recklessly causes or attempts to cause death” while causing damage to a protected computer.

¹³ See U.S.S.G § 2B1.1(b)(13). 18 U.S.C. § 656 Theft, etc. by employee of financial institution - 30 years.

administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit.”

This proposed Application Note subdivision is intended to address situations in which the defendant wrongfully obtained certain disaster-related benefits -- such as emergency-assistance payments, emergency-assistance loans, or payments on disaster-related insurance claims -- relating to government agencies (including, federal, state, or local agencies), not-for-profit private-sector entities such as the American Red Cross, or commercial entities such as insurance companies. Our experience with the Katrina Task Force has shown that while some defendants in disaster-fraud cases have submitted multiple fraudulent applications for disaster-related benefits to the same government agency, other defendants in such cases have submitted multiple fraudulent applications for such benefits to different agencies at federal and state levels and to private entities (*e.g.*, applications for emergency benefits to the Federal Emergency Management Agency, as well as applications for disaster-related unemployment to state government agencies in multiple states). In these cases, different government agencies and private entities may incur separate and distinguishable costs associated with their efforts to recover the funds paid to the defendant.

The Commission has also asked *“Should the proposed amendment repromulgating the emergency amendment expand the scope of the enhancement to cover fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid “in connection with any procurement of property or services related to any emergency or major disaster declaration as a prime contractor with the United States or as a subcontractor or supplier on a*

contract in which there is a prime contract with the United States”?” We believe that it should.

The same type of emergencies that necessitate the quick disbursement of funds to individuals who are the victims of a major catastrophe are also present in the contracting process that must take place with little if any vetting. Basic services such as gasoline, electricity generators, housing, food, water, must all be supplied, often in large amounts and within hours of the triggering event. As Section 1040 recognizes, these are the types of services that are desperately needed, susceptible to fraud because of the chaos surrounding the disaster, and should be protected by the deterrent effect of increased punishment.

Although the Act makes clear that Congress intended to impose increased punishment upon the perpetrators of fraud in connection with an emergency or disaster, some have argued that the Commission should not increase penalties because section 2B1.1 already accommodates the new offenses set forth in the Act. These critics argue that section 2B1.1 requires upward adjustments for conduct that will likely be inherent in most fraud prosecutions involving disaster or emergency benefits, including:

- Increases of between 2 and 6 levels if the offense involved 10 or more victims (2B1.1(b)(2));
- A 2 level increase and a floor of 10 if the defendant misrepresented that s/he was acting on behalf of a charitable organization or a government agency (2B1.1(b)(8)); and
- A 2 level increase and a floor of 12 if the offense involved relocating to another jurisdiction to evade law enforcement or regulatory officials or otherwise involved sophisticated means (2B1.1(b)(9)).

In fact, the Katrina Fraud Task Force’s experience is that none of these three examples from section 2B1.1 would be inherent or routine to most fraud prosecutions involving disaster or emergency benefits. A vast number of our disaster-fraud cases involve single or multiple applications to a single agency, or perhaps three or four agencies. These fraudulent benefit applications do not involve 10 or more victims in the way that section 2B1.1(b)(2) intends, although – for the reasons stated earlier – they may have indirect and more widespread effects on legitimate victims who are deprived of access to those benefits. Nor do most of these applications involve assertions that the applicants are acting on behalf of charitable organizations or government agencies, although a small number of Katrina fraud prosecutions have involved such assertions.¹⁴ Similarly, we have not seen a significant number of cases in which criminals conducting disaster-fraud schemes have relocated to another jurisdiction to evade law enforcement or regulatory officials. In many of our cases involving fraudulent applications for emergency assistance, the defendants simply submitted their applications from their true states of residence outside the affected areas, and did nothing that could constitute “relocating to another jurisdiction.” Under these circumstances, amending section 2B1.1 to include an explicit enhancement and floor would be the one solution most likely to cover the majority of disaster-fraud prosecutions.

Critics have also suggested that the Commission should engage in a cost-benefit analysis and conclude that the costs of incarceration outweigh the harm caused by those convicted of

¹⁴ See United States Attorney’s Office, *supra* note 8; United States Attorney’s Office, Southern District of Florida, Press Release, May 8, 2006, *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/pr/press_releases/2006/may/USAO_FLS_05082006.pdf, and Press Release, January 30, 2006, *available at* <http://www.usdoj.gov/usao/fls/060130-01.html>.

obtaining allegedly small amounts of fraudulent disaster benefits. The Task Force, however, has seen numerous situations in which a number of defendants acting in concert collectively caused tens of thousands of dollars, even hundreds of thousands of dollars, in losses to relief organizations. While the average losses attributable to each individual defendant might be comparatively small, the aggregate effect of their concerted actions can be substantial. For example, in the series of related cases prosecuted in the Eastern District of California that were mentioned earlier, the United States Attorney's Office investigated an extensive scheme to defraud the American Red Cross of funds intended for Hurricane Katrina victims, by submitting or causing others to submit a fraudulent claim through the American Red Cross call center located in Bakersfield; most of the defendants received probation.¹⁵ Similarly, in one matter in the Middle District of Louisiana, 17 related defendants were convicted of submitting fraudulent applications to FEMA. The actual loss to FEMA in that case was \$67,074, with no defendant receiving more than \$14,716 individually. However, at least 30 fraudulent applications were filed and the potential loss to FEMA was \$440,000 or more if the scheme had not been discovered and stopped. To date, 15 of the defendants have been sentenced, with 13 receiving sentences of probation, one receiving a sentence of 18 months incarceration and one receiving a sentence of 10 months incarceration. In both cases where the defendants were sentenced to terms of incarceration, the higher guideline range was a result of the defendant's criminal history score. It is important that those who would consider profiting from the misfortunes of others understand that whether they act alone or in concert, and regardless of whether they individually cause

¹⁵ See HURRICANE KATRINA FRAUD TASK FORCE, U.S. DEP'T OF JUSTICE FIRST-YEAR REPORT TO THE ATTORNEY GENERAL at 16 (September 2006), *available at* http://www.usdoj.gov/katrina/Katrina_Fraud/docs/09-12-06AGprogressrpt.pdf.

smaller losses to the government or relief agencies, they will run a significant risk of imprisonment.

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Mr. Chairman, that concludes my prepared statement. I would be pleased to take any questions from you and members of the Commission at this time.