APPENDIX C

PUBLIC BRIEFING ON EMERGENCY AND DISASTER ASSISTANCE FRAUD PENALTY ENHANCEMENT ACT OF 2007

WEDNESDAY, FEBRUARY 13, 2008

PANEL ONE

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PREPARED STATEMENT

OF

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UNITED STATES DEPARTMENT OF JUSTICE

BEFORE

THE UNITED STATES SENTENCING COMMISSION

FEBRUARY 13, 2008

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

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[2] *Id. at 4.*

[3] HURRICANE 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

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[4] *Id.*

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

[6] HURRICANE 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

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[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/09-04-07lturner-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

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[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 only10 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 than[12] 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

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[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 (2Bl.l(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

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[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.

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Testimony of
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on behalf of the Federal Public and Community Defenders
Before the
United States Sentencing Commission
Public Hearing on Proposed Disaster Fraud Amendments
February 13, 2008

My name is Marjorie Meyers, and I am the Federal Public Defender for the Southern District of Texas. I would like to thank the United States Sentencing Commission for holding this hearing and for giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding implementation of the proposed disaster fraud amendments.

In response to the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110-179, the Sentencing Commission promulgated emergency amendments made effective February 6, 2008, which provide for a new two-level enhancement if 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." USSG § 2B1.1(b)(16). The amendment also explains that in disaster fraud cases, the "reasonably foreseeable pecuniary harm includes the 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 that were reasonably foreseeable." USSG § 2B1.1, cmt. (n. 3(A)(v)(IV)). The Commission now seeks to make those amendments permanent and seeks comment on whether to provide a minimum offense level for these offenses, whether to expand the enhancement to include contract related disaster fraud, and whether there are aggravating or mitigating circumstances in disaster fraud cases that might justify additional amendments to the guidelines.

As we indicated in our comments on the emergency amendments, we believe that USSG § 2B1.1 already adequately accommodates the new offenses set forth in Pub. L. 110-179. As with all other types of fraud, those offenses necessarily encompass a wide range of activity, from first-time offenses involving small amounts of funds to large-scale operations designed to defraud the government or others of millions of dollars. In the disaster-related context, offenders range from desperate victims of the disaster itself to con men ready to take advantage of the disaster and its victims.

As the experience of our clients demonstrates, many of the individuals prosecuted for disaster relief fraud after Hurricanes Katrina and Rita were themselves victims of the disaster. Many had little or no criminal record and are the sole support of their minor children. They stole to obtain the most basic necessities for survival or because they were manipulated by recruiters who took advantage of their desperate plight. They are not likely to offend again, and, for most, incarceration is a punishment greater than necessary to meet the purposes of 18 U.S.C.§ 3553(a). In such cases, imposing a prison sentence could end up costing society more than the original crime, both because of the substantial costs of incarceration and because of the longer-term societal costs of failing to provide treatment for mental health issues or of removing the custodial parent from the care of her/his children.

The Disaster

On August 29, 2005, Hurricane Katrina slammed into the Louisiana and Mississippi Gulf Coasts. According to FEMA Director David Paulison, "Hurricane Katrina was the most catastrophic natural disaster in our nation's history."[1] "The scope of human suffering inflicted by Hurricane Katrina in the United States has been greater than that of any hurricane to strike this country in several generations."[2] The storm devastated a 90,000 square mile area, roughly the size of Great Britain, and forced more than 270,000 people into shelters.[3] More than 1800 people lost their lives.[4] Thousands of homes and businesses were destroyed in New Orleans alone, while entire coastal

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[1] *See* http://www.fema.gov/hazard/hurricane/2005katrina.anniversary.shtm.

[2] Richard D. Knabb, Jamie R. Rhome & Daniel P. Brown, National Hurricane Center, *Tropical Cyclone Report, Hurricane Katrina, 23-30 August 2005* (updated 10 August 2006) ("NHC Report") at 10-11 (available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf).

[3] *See* http://www.fema.gov/news/newsrelease.fema?id=29109.

[4] *See* Association of Community Organizations for Reform Now (ACORN) v. Federal Emergency Management Agency (FEMA), 463 F.Supp.2d 26, 29 n.2 (D.D.C. 2006) (citing FEMA Disaster Information Page (Aug. 22, 2006), http://www.fema.gov/news/newsrelease. fema; National Oceanic Report on Katrina, http://www.ncdc.noaa.gov/oa/reports/tech-report-200501 z. pdf)), stayed in part, 2006 WL 3847842 (D.C. Cir. Jan.22, 2006).

communities were obliterated along the Mississippi coast.[5] Approximately 3,000,000 people in Louisiana, Mississippi, Alabama, Georgia and Florida were left without power, and approximately 1,200,000 were placed under some sort of evacuation order.[6] Equally catastrophic were the financial costs of the storm. In August, 2006, the National Oceanic and Atmospheric Administration estimated the total damage cost to be approximately $125 billion.[7]

Hurricane Rita made landfall along the Texas coast less than a month later on September 24, 2005, wreaking havoc on those who had been spared by Katrina. Some 424,696 people were affected by the storm in Texas.[8] "One of the most intense hurricanes ever recorded during the Atlantic Hurricane Season," Rita displaced approximately 37,000 people from Louisiana to Texas and 33,000 people from Texas to other states, costing FEMA $528 million in aid to those displaced families.[9] FEMA offered $521 million in rental assistance, $94 million in other needs assistance and 4605 temporary housing units to Texas residents.[10] Two years later, 932 Texas households were still in temporary housing.[11]

In Louisiana, twenty-three parishes were designated disaster areas.[12] Approximately 366,000 people were affected by the storm. Some 10,151 claimants received disaster unemployment assistance, 11,000 households received temporary housing units, and 54,900 people received other needs assistance.[13]

The storms took their greatest toll on the most vulnerable members of our society: the poor

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[5] *See* NHC Report at 11-12.

[6] Id. at 12-13.

[7] *See* ACORN, 463 F.Supp.2d at 29 n.2; NHC Report at 12 (estimating losses at upwards of $81 billion).

[8] http://www.fema.gov/news/newsrelease.fema?id=40920.

[9] ACORN, 463 F.Supp.2d at 29 n.2.

[10] http://www.fema.gov/news/newsreelase.fema?id=29109.

[11] Id.

[12] http://www.fema.gov/news/newsrelease.fema?id=29987

[13] Id.

and the mentally ill.[14] Unemployment in the Gulf Region shot up from 5.5%-7.4% pre-Katrina to 16.5% immediately after the storm,[15] when thousands of people were left homeless and impoverished. Those with pre-existing mental health issues were unable to obtain treatment, and thousands more developed new mental health problems such as post-traumatic stress disorder, depression, anxiety and suicidal ideation.[16]

The Current Guideline

Guideline 2B1.1 already allows the courts to take into account the wide variety of criminal conduct arising out of the disasters. As a result of the statutory increase in penalties for disaster-related mail and wire fraud, 18 U.S.C.§§ 1341, 1343, and the new offense set forth at 18 U.S.C.§ 1040, persons convicted of theft or fraud will already be subject to the enhanced base offense level of seven even if losses are minimal. See USSG § 2B1.1(a)(1). Section 2B1.1(b)(1) specifically ties increased loss to increased offense levels. It also requires upward adjustments for conduct that will likely be inherent in the more egregious fraud prosecutions involving disaster or emergency benefits, including:

-Increases based on the number of victims, USSG § 2B1.1(b)(2);

-A two-level increase and a floor of ten if the defendant misrepresented that s/he was

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[14] *See* U.S. Census Press Release, *Census Bureau Estimates Nearly 10 Million Residents Along Gulf Coast Hit by Hurricane Katrina* (Sept. 2, 2005) (noting that about 2.1 million people were living in poverty in the areas that were hardest hit by the storm); Appleseed Foundation, *A Continuing Storm: The On-Going Struggles of Hurricane Katrina Evacuees* ("Appleseed Foundation") at 3 (opining that "the mental health toll could turn out to be one of the most significant long-term impacts of the storm").

[15] *See* Appleseed Foundation at 4 (noting that, while unemployment rates ultimately leveled out at only slightly above pre-Katrina levels, "[a] substantial number of evacuees face barriers which impede the search for employment, including childcare needs, insufficient transportation, inadequate training, and unresolved healthcare and mental health issues").

[16] Id. at 3 (describing the "critical need to address mental health issues relating to Hurricane Katrina. . . .Some evacuees had pre-existing mental health issues that were left untreated in the weeks and months following the hurricane. Substantial numbers of additional evacuees have now developed mental health problems such as depression and post-traumatic stress disorder. . . .The mental health toll could turn out to be one of the most significant long-term impacts of the storm"); *see also* National Institute of Mental Health, *Mental Disorders persist Among Hurricane Katrina Survivors* (Jan.24, 2008), available at http://www.nimh.nih.gov/sciene-news/2008/mental-disorders-persist-among-hurricane-katrina-survivors.shtml.

acting on behalf of a charitable organization or a government agency, USSG § 2B1.1(b)(8); and

-A two-level increase and a floor of twelve if the offense involved relocating to another jurisdiction to evade law enforcement or regulatory officials or otherwise involved sophisticated means, USSG § 2B1.1(b)(9).

Chapter Three provides additional opportunities to impose a higher sentence where warranted, including enhancements for offenses involving vulnerable victims, USSG § 3A1.1(b), for defendants who played an aggravating role in the offense, USSG § 3B1.1, and for defendants who abused a position of public or private trust or who used a special skill. USSG § 3B1.3. Defendants who used the identity of another, including a social security number, are subject to a mandatory two-year consecutive sentence if convicted under 18 U.S.C.§ 1028A(a)(1), (b).

The Guidelines in Practice

In our experience with disaster fraud cases, the Guidelines already account for the range of offenses. Defendants who received probation or other lenient sentences had not engaged in an organized attempt to defraud anyone. The cases typically involved a single claim from an individual who was an actual disaster victim but who nonetheless falsified information on a benefits application or failed to terminate unemployment benefits upon re-employment. The dollar values were low, and the defendants were often indigent single parents with mental health issues and no prior criminal record. Often they were manipulated by recruiters into applying for benefits. Typically, the government did not oppose the lenient sentences in these cases. On the other hand, more serious criminals were subject to lengthy sentences.[17]

The following are examples of the types of cases that we handle that involve disaster related fraud.

The majority of cases in the Middle District of Louisiana involved single women with young children living in public housing. Many of them had no criminal record. They were uneducated and either unemployed or underemployed. Most of them had some type of property damage: to cars, windows, clothing that was water soaked, or refrigerated foods that went bad when power was lost. However, they did not evacuate or were not entitled to claim housing damage because they were renters. As a result of their federal felony convictions, these women and their families have lost their federally subsidized housing in an area where the cost of housing post-Katrina and Rita has skyrocketed.

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[17] *See e.g.* U.S. Dept. of Justice Press Release, *Hurricane Katrina Fraudster Sentenced to 43 Years in a Federal Prison*, available at http://www.usdoj.gov/usao/alm/Press/willis_sentence.html.

Clients who relocated to Baton Rouge from New Orleans after having evacuated to Houston and elsewhere have developed severe mental problems, particularly those who initially tried to ride out the storm in New Orleans. One such defendant stayed in New Orleans to help her family. Before the storm, she was a strong, independent working woman. She was among those who thronged to the convention center, where people were dying, and she ultimately waited on the Interstate for three days in the sun and heat before being bussed to Houston. Unbeknownst to her, the remainder of her family was in Dallas. In Houston, she met a young man who brought her to Baton Rouge, where she found a job with her former employer from the New Orleans area. She had no criminal history at all. She was charged with wire fraud for claiming unemployment benefits when she was working. She has returned to the New Orleans area but is now suffering from severe post-traumatic stress syndrome and depression. Her family is scattered throughout the South.

A young Mississippi woman was living with her boyfriend in a trailer until May 2005 when she moved in with her mother because complications with her pregnancy required bed rest. Katrina forced her to evacuate to Panama City, Florida. When she returned to her trailer a week later, she discovered that her personal belongings had been damaged, including her furniture, appliances and clothing. She also learned that her ex-boyfriend had sold some of her clothing on EBay. She received approximately $11,000 in FEMA funds for these losses but was prosecuted because the trailer lease and utilities were in her boyfriend's name.[18] The government did not oppose a sentence of probation.

Another single mother was living temporarily with her mother after spending a month in the hospital recovering from back surgery. She evacuated to Pensacola, Florida with her mother and eleven-year-old daughter. They stayed in a shelter for about a month and half. When she returned, she discovered that her personal possessions left in the apartment had been lost. She was prosecuted for receiving approximately $13,000 because she was not living in the damaged apartment at the time of the storm. She will lose her job at the hospital due to the felony conviction. She may yet be

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[18] There was a lot of confusion about the ability of members of a single household to obtain housing assistance. Normally, FEMA will provide all members of a single household with one temporary residence based on the assumption that members of a single household will relocate together. 44 C.F.R. § 206.117(b)(1)(i)(A); *see also* Declaration of Donna Daniels, Acting Deputy Director of the Recovery Division at FEMA, at ¶ 20, ACORN v. FEMA, Civ. No. 06-1521-RJL (D.D.C. Sept. 11, 2006).

FEMA recognized, however, that many of those displaced by Katrina were separated during evacuation and unable to reconnect after the storm. As early as September 19, 2005, FEMA modified its "shared household rule," providing separate assistance to members of a single household who were separated post-Katrina. McWaters v. FEMA, 436 F.Supp.2d 802, 821 (E. D. La. 2006) (denying injunctive relief because modification was discretionary). Unfortunately, FEMA did not consistently advise applicants of the modification. Id.

a success story. Although she is a single mother, she works two jobs and recently graduated from culinary school. She also volunteered at the Red Cross after the storm.

Another Mississippi defendant, who can neither read nor write, was receiving disability payments because he has been diagnosed with diabetes, hypertension, and asbestosis. He had been residing with his daughter in an apartment in Gulfport that sustained storm damage. This defendant was prosecuted because he reported living at the family residence, which was no longer occupied. He received a sentence of five years' probation without opposition from the government.

A Mississippi resident was sentenced to probation conditioned on six months' house arrest, without government opposition, after she made a claim on a trailer that she and her husband had been fixing up but they had not yet moved into. Nevertheless, many of her personal possessions and her dog were in this home, all of which were lost to the storm. Her husband was a shrimper, whose source of livelihood was destroyed by the storm and she is a homemaker with virtually no education and no criminal record. They had evacuated but had no lease to document the trailer.

A partially blind, illiterate mother of three was induced by her husband to make a claim that the siding on their home had been blown away by the storm. The home was indeed damaged but the siding had been sold earlier. The FEMA award was sufficient to enable the couple to obtain a new trailer. The woman received a probated sentence without objection from the government, and the government declined to forfeit the trailer because the family was so poverty-stricken.

A parolee was living in a halfway house in Beaumont when Rita struck. The residents were evacuated to another halfway house in Houston where many were led to believe that they were eligible for relief because they had evacuated. The government charged the evacuee with making a false claim based on his receipt of approximately $2000. The Bureau of Prisons determined that the defendant was severely mentally disabled but competent to stand trial. After the district court learned of the conflicting and confusing advice offered this evacuee, the defendant was found not guilty.

A forty-nine-year-old grandmother living in HUD Section 8 housing in Houston allowed her daughter to use her name and Social Security number to apply for expedited hurricane assistance. The woman and her daughter split the $2000 in proceeds. The government agreed that a sentence of probation was appropriate.

A New Orleans resident evacuated after Hurricane Katrina and found shelter outside of Houston. He had twice been hospitalized for mental illness and had at some time received disability payments. He applied by telephone for disaster unemployment assistance but when he did not receive the debit card in timely fashion, he called again inquiring about the card. After he received the first card, the second arrived. The disaster relief personnel had apparently erred in transcribing his Social Security number by one digit. Because he then used both cards to obtain disaster unemployment benefits, thereby wrongfully receiving approximately $3724, he was convicted of wire fraud and aggravated identity theft. Thus, he will receive a mandatory two-year sentence consecutive to the wire fraud sentence.

Even those clients who were not themselves disaster victims were often nonetheless victimized by con artists eager to take advantage of their limited resources and desperate situations. For example, uneducated and illiterate clients were preyed upon by enterprising "sellers" of New Orleans street addresses. Typically, these sellers would go to local shelters and grocery stores and advertise New Orleans addresses for sale for FEMA claims. The defendants "bought" the addresses from the seller, who filed Internet or telephone claims. When the FEMA check arrived, the defendant paid between $500 to $1000 of the $2000 check to the seller. While the buyers were convicted, the sellers escaped prosecution.

A typical circumstance is reflected in a recent sentencing memorandum from the Middle District of Florida:

> Defendant also took advantage of those he assiduously recruited to participate in his scheme. Some were of marginal intelligence, some were young - one was a teenager with no prior criminal history who trusted the Defendant. Almost all of those lured into the scheme were poor. Though they participated in this scheme of fraud and have pled guilty, they too have been victimized by the Defendant.[19]

In the Florida case, the defendant had gone to a severely impoverished, rural area to recruit people to submit claims for disaster relief. Among those recruited was a woman with borderline intelligence and little or no education who lived in a tiny, isolated trailer. The woman agreed to call a toll-free number to submit a claim for disaster relief. Of the $2,000 disbursement she received, she kept $500 and gave $1500 to the defendant. The district court properly considered the woman's individual circumstances and role in the offense and sentenced her to probation. In contrast, the defendant who recruited her and others like her received a sentence of fifty months in prison.

In the Middle District of Alabama, the government has prosecuted a number of people for submitting false claims for disaster relief. One woman, a single mother living in extreme poverty, is currently facing sentencing for filing a false claim for relief after being recruited by an acquaintance. Of the $2350 she received, the woman gave the recruiter $2050 and kept only $300, which she used to pay her utility bill so that the utilities would be turned back on in the apartment she shared with her four children. As with many of our disaster fraud clients, in addition to being

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[19] *See* Sentencing Memorandum, dated Oct. 13, 2006, filed in United States v. McNeil, No. 6:06-cr-77-Orl-28DAB (Antoon, J.).

an impoverished single mother, this woman was suffering from an untreated mental illness at the time of her offense and had obtained only a ninth grade education, leaving her particularly vulnerable to the advances of others. Because the government chose to prosecute this woman under the aggravated identity theft statute for submitting the claim under her daughter's social security number, she is subject to a two-year mandatory minimum prison sentence irrespective of the guideline range.

On the other hand, defendants who gamed the system have received significant punishment. A defendant in the Southern District of Texas received $35,548 when he falsely claimed residence in New Orleans and Beaumont and used false Social Security numbers. He was sentenced to serve a total of thirty-nine months in prison. In light of the mandatory two-year consecutive sentence for aggravated identity theft, the government agreed that upward departure was not appropriate. Another defendant created a website diverting funds designated for the Salvation Army. After trial, he received a 111-month sentence, which included enhancements for the amount of loss, the number of victims (donors), use of sophisticated means, falsely representing himself to be a charity, and a four-year consecutive prison term for two convictions of aggravated identity theft. As noted previously, another defendant received a forty-three-year prison sentence for committing fraud related to Hurricane Katrina.[20]

Disaster Relief Enhancements Should be Limited to the Most Culpable

While we oppose any change in Guideline 2B1.1, the addition of administrative costs to the loss calculation and the proposal to promulgate a floor are particularly ill-advised. With respect to administrative costs, we note that many of the individuals prosecuted for disaster relief fraud are themselves indigent with little or no means of repaying the money. Calculation of these costs will be exceedingly difficult. For example, if the defendant evacuee was forced to move repeatedly, the administrative costs of recovery will presumably increase. If the defendant has no funds to make repayment, delays in payment and court actions, likely to be futile, will increase the cost of recovery. FEMA's record of dispensing and recovering funds is replete with examples of inaccurate and incomprehensible instructions, documents sent to the wrong address, and other administrative mismanagement.[21]

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[20] *See* footnote 17.

[21] Granting a preliminary injunction preventing FEMA from cutting off housing benefits, Judge Leon noted: "It is unfortunate, if not incredible, that FEMA and its counsel could not devise a sufficient notice system to spare these beleaguered evacuees the added burden of federal litigation to vindicate their constitutional rights." ACORN, 463 F.Supp.2d at 29. FEMA's letters "cryptically indicated, by a code or phrase inserted therein, FEMA's decisions and, if necessary, its purported reasons for denying (or terminating) benefits. . . .Beyond the code or phrase inserted automatically into each letter, FEMA provided little other individual explanation for its decision to deny or terminate benefits. To the contrary, FEMA frequently sent more than one letter to an evacuee

Any floor in the guideline, above and beyond the seven-level floor already contained in Guideline 2B1.1, will create "unwarranted *similarities*" among dissimilarly situated individuals. See Gall v. United States, 128 S.Ct. 586, 600 (2008) (emphasis in original). As the foregoing reveals, individuals convicted of disaster-related fraud range from the poverty-stricken, traumatized victims of the disaster to the fraudster who takes advantage of the desperation of both the victims and the service providers.

Moreover, disaster relief is not limited to hurricanes. The President can declare an emergency for all manner of disasters ranging from hurricanes and earthquakes to drought or wild fires.[22] A minimum offense level would all too easily condemn to prison the farmer who wrongfully obtains unemployment compensation while his crops wither on the vine, even though such a result would not serve the purposes of sentencing.

Mitigating Circumstances

The Congressional directive instructs the Sentencing Commission to account for any mitigating circumstances that might justify exceptions to the disaster relief amendments. A defendant's experience as an actual victim of the disaster is a mitigating circumstance that should be included in any amendment. Should the two-level enhancement for disaster related fraud, USSG § 2B1.2(b)(16), be made permanent, we suggest that the Commission recognize that an offender's status as a victim of the disaster is a mitigating factor. The Commission could specify that the § 2B1.1(b)(16) enhancement shall not apply if the defendant has been detrimentally affected by the disaster. Alternatively, the Commission could encourage a downward departure in these circumstances.

Conclusion

In summary, we believe that a minimum base offense level is particularly inappropriate for a Guideline that encompasses such a broad range of conduct including the desperate acts of individuals uprooted and traumatized by the disaster itself. Further, inclusion of the administrative costs of recovery as reasonably foreseeable pecuniary harm is unwarranted by the nature of the offense and impractical in application. If anything, the Guideline should be amended to encourage courts to take into account the mitigating circumstances of those who turned to fraud out of desperation after becoming disaster victims themselves.

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containing *contradictory* codes or explanations, ..., and calls by evacuees to a 'toll-free helpline' frequently resulted in conflicting 'review of the applicant's case file on the spot' that plaintiffs found 'confusing and chaotic.'" Id. (citations omitted, emphasis in original).

[22] 42 U.S.C.§ 5122(2).

"In our civilization there are fearful times when the criminal law wrecks a man."[23] As the Supreme Court has repeatedly recognized: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensure." Gall v. United States, 128 S.Ct. 586, 598 (2008)(quoting Koon v. United States, 518 U.S. 81, 98 (1996)). A minimum offense level requiring incarceration would too often wreck those who have already been victimized by outside forces and would undermine our long standing commitment to individualized justice.

Respectfully submitted,

Marjorie A. Meyers
Federal Public Defender
Southern District of Texas

[23] Victor Hugo (translated by Lee Fahnestock and Norman MacAfee), Les Miserables, at pp. 84-85 (1862) (Signet Classic, New York, New York 1987) (recognizing the injustice of imprisoning a man for stealing a loaf of bread to feed his family).

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FEB - 8 2008

Honorable Ricardo H. Hinojosa, Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Re: Sentencing Commission Hearing on Enhanced Penalties for Disaster Fraud

Dear Chairman Hinojosa:

It is my understanding that, pursuant to Section 5 of Pub. Law 100-179 (Jan. 7, 2008), the Department of Justice (DOJ) has proposed amendments to Section 2B1.1 of the Federal Sentencing Guidelines, which will enhance the offense level by 2 (with a floor of 14), and will permit the inclusion of the administrative costs of recovery in the calculation of loss, for disaster fraud. This letter expresses the support of the United States Department of Housing and Urban Development (HUD), Office of Inspector General (OIG), for DOJ's proposal. As a consequence of HUD's efforts to respond the September 11, 2001 terrorist attack in New York City, the devastation of the Gulf Coast by Hurricanes Katrina, Rita and Wilma, and other natural disasters, HUD-OIG has become acutely aware of the vulnerability of Federal disaster assistance to fraud. HUD-OIG strongly believes that this vulnerability derives largely from the laudable motivation to quickly provide assistance to those in need during their time of need, not months later, and the unfortunate realities that the volume of assistance payments complicates detection, and that the relatively small dollar amount of the majority of such payments tends to reduce the likelihood of prosecution. HUD-OIG is convinced that DOJ's proposal to enhance the offense level for disaster fraud will improve the likelihood of prosecution of disaster fraud cases and increase deterrence, and, thus, will reduce the vulnerability of disaster assistance to fraud. Additionally, HUD-OIG is encouraged that DOJ's proposal recognizes the substantial resources that the Federal government invests in fraud recoveries associated with disasters. Recovery costs represent real losses to both the government and the intended beneficiaries of the assistance, and they rightly should be treated as losses. Accordingly, HUD-OIG is proud to express our support for the proposal.

Background

When a major disaster occurs, HUD provides critical housing and community development financial resources to aid rehabilitation. HUD also cooperates with other Federal and state agencies to implement disaster recovery efforts. HUD-OIG is responsible to detect and prevent waste, fraud, and abuse in HUD's operations and programs, and to seek administrative sanctions, civil recoveries and/or criminal prosecutions against those who have committed waste, fraud or abuse.

In response to the events of September 11th, Congress appropriated $3.6 billion for the housing and community development programs in Lower-Manhattan and other areas affected by the terrorist activities. Similarly, in response to the devastation of the Gulf Coast by Hurricanes Katrina, Rita and Wilma, Congress appropriated almost $20 billion in disaster relief. HUD, via interagency agreements, also has performed various mission assignments for the Federal Emergency Management Agency (FEMA), and in December of 2007, HUD assumed FEMA's responsibility for the provision of long-term rental assistance for approximately 45,000 families affected by the hurricanes.

Through our experience with the events of September 11th, the aftermath of the Gulf Coast hurricanes, and the circumstances following prior disasters, HUD-OIG has gained extraordinary insight into combating HUD disaster-related fraud. We have learned that because of the exigent nature of disaster response/recovery, assistance needs to be awarded quickly, and as a consequence many policies and controls normally in place for grant programs are waived or not strictly adhered to. HUD-OIG does not believe that it is realistic to expect that the realities of providing disaster assistance will shift such that increased internal controls and fraud prevention mechanisms may be applied during future disasters. Unfortunately, following each of these disasters HUD-OIG detected substantial cases of fraud, but all cases detected were not prosecuted. HUD-OIG believes that stronger penalties for disaster assistance fraud should improve the likelihood of prosecution and deterrence, and thus counteract some of the inherent susceptibility of disaster assistance to fraud.

Offense Level Enhancement

Diminished Internal Controls

Disasters such as September 11th and Hurricane Katrina prompt emergency responses, and during these emergency situations internal controls ordinarily attendant to Federal grant programs are mitigated for humanitarian reasons and/or public pressure. The responses of the States of Louisiana and Mississippi to Hurricane Katrina's physical destruction of private real estate reflect a disparity of actions and public reactions to the application of internal controls during emergencies. Both states, using Federal disaster funds, implemented programs designed to assist homeowners to repair damaged homes or to move. Mississippi's program employed less robust internal controls, and as a result it implemented its program more quickly and with less public criticism.

Louisiana on the other hand, in coordination with HUD-OIG and the Federal Bureau of Investigation (FBI), implemented extensive internal controls for its Road Home Program. For example, Louisiana and its contractor, ICF International (ICF):

1. Obtains digital photographs of each applicant and co-applicant;
2. Requires each applicant to sign their application, certifying to the truthfulness of the information under penalties of 18 U.S.C. § 1001 (False Statement);

3. Verifies applicant data with information provided to FEMA, the Louisiana Department of Revenue, the Small Business Administration (SBA), and local land records;
4. Internally investigates all applicants who did not possess a FEMA applicant number; and
5. Trains ICF employees in the area of fraud awareness.

Based upon referrals made to HUD-OIG, we believe that Louisiana's internal controls prevented the success of many fraudulent applications. Unfortunately, these internal controls initially delayed program delivery to the ultimate beneficiaries, and the State received tremendous political pressure and media ridicule because of a perception of plodding progress.

In further illustration of this point, the HUD Office of Public and Indian Housing (PIH) recently took over administration of FEMA's Disaster Housing Assistance Program (DHAP). Previously, FEMA had administered the program itself. When PIH took over the program it discovered that 6,771 families, out of the universe of 45,000 families who have been assisted by DHAP, did not reside at the address listed on grant records. Inadequate internal controls appear to factor in causing this problem (e.g., the addresses are examples of data-entry errors or fraud). FEMA received significant criticism for the perceived tardiness of its recovery response during the time period immediately following Hurricanes Katrina, Rita and Wilma, but it has received little if any negative scrutiny regarding its administration of DHAP.

Accordingly, we are concerned that the virulent criticism that Louisiana received and FEMA initially endured will impel future HUD disaster assistance conduits to waive or minimize fraud-prevention controls normally present in grant programs. It is reasonable to conclude that diminished or ineffective internal controls, aggravated by a huge volume of applications, make a grant program easier to defraud. Indeed, as the case examples set forth below reflect, disaster fraud can be surprisingly simplistic and yet successful. Thus, in the absence of preventative measures of this sort, HUD-OIG believes that greater deterrence associated with enhanced penalties is necessary.

Disaster Frauds

A. September 11th Frauds

In the aftermath of the terrorist attacks of September 11th, Congress authorized HUD to provide the State of New York with approximately $3.6 billion in disaster assistance to aid recovery and revitalization. Further, Congress insisted that HUD rapidly assist the recovery of Lower-Manhattan, which is the area south of Houston Street that was hardest hit by the attack. Internal controls suffered and frauds were perpetrated, as follows.

Lower-Manhattan Development Corp (LMDC) was created by the State and City of New York to coordinate the rebuilding and revitalization of Lower-Manhattan. To further this goal, the LMDC made HUD-funded Residents Grants and Two-Year Commitment-Based Grants. The Residents Grants were paid to eligible individuals who lived in one of three designated zones in Lower-Manhattan on September 11th. The Two-Year Commitment-Based Grants provided money to eligible individuals who made a prospective two-year commitment to live in one of the zones. Both of these programs experienced fraud. For example, LMDC referred Jobim Rose to HUD-OIG for investigation. Rose, a recipient of the Two-Year Commitment-Based Grant, was found to have sublet 310 Greenwich Street, Apartment 36A, the subject of the two-year commitment, to Richard Scott Marshall. Marshall had been subletting Apartment 36A, from Rose for some time. Indeed, during HUD-OIG's investigation, Marshall showed a HUD-OIG representative a video tape of the Twin Towers collapse that he had captured through the window of Apartment 36A, demonstrating that Rose had not even occupied the apartment on the date of the attack. The investigation further revealed that Rose did not reside in Lower-Manhattan at all. Rose plead guilty and was sentenced to 48 months probation and court ordered restitution.

Allan Klein, a British Citizen, submitted a grant application to LMDC under the Two-Year Commitment-Based Grant. Klein claimed that his then current address was 71 Broadway, Apartment 9F. Several months later, LMDC mailed a letter to Klein at Apartment 9F via the United States Postal Service (USPS). Soon thereafter, USPS returned the letter to LMDC pursuant to its instructions not for forward its correspondence. HUD-OIG investigated and determined that Klein was living in Fort Lauderdale, FL and had been subletting Apartment 9F, in contrast to his commitment. Klein pled guilty and was sentenced to six months imprisonment, $1,000 fine, and three years supervised release.

The Empire State Development Corp (ESDC) processed the World Trade Center (WTC) Business Recovery Grant (BRG) program. BRG grants were intended to revitalize businesses damaged by the terrorist attacks on the WTC. Prior to the attack, Chang Sheng Yu, an undocumented alien, leased 350 square feet of space at 2 WTC for his company, American McKinley Venture Management, Inc. Yu applied for a BRG, based upon losses allegedly experienced by American McKinley Venture Management, Inc. BRG applicants were required to submit a Federal tax return in support of their applications. Yu prepared a tax return that overstated his business expenses. Yu received a BRG in the amount of $118,876. Additionally, Yu, using personal data from job applicants that had applied for jobs with American McKinley Venture Management Inc. but who had not been hired, exaggerated the size of his company's staff, in order to qualify for a Small Firm Attraction and Retention Grant Program (SFARG). SFARG is another business grant designed to compensate employers based on the number of employees that they had. Yu pled guilty and was sentenced to 15 months imprisonment, 36 months supervised release, special assessment of $800, and restitution of $118,876.

David Zimmer, a resident of Maryland, a Certified Public Accountant, and the president of DZ Investments Inc. DBA Total Business Solutions (DZ), submitted an application for a BRG on behalf of DZ. In connection with the application, Zimmer provided ESDC with a purported copy of DZ's 2000 Federal tax return which showed gross receipts of $3,327,423. ESDC used this amount to calculate a BRG in the amount of $270,000, and wired the proceeds of the BRG to DZ. However, a check with the Internal Revenue Service revealed a discrepancy in the tax information provided by DZ, and ESDC referred the matter to HUD-OIG for investigation. HUD-OIG visited 40 Rector Street, New York, NY, which Zimmer claimed on his BRG application was DZ's address, and found that DZ did not occupy space at 40 Rector Street. Further, investigation revealed that DZ was based in Maryland, not NY. Zimmer plead guilty, and was sentenced to 24 months incarceration, 36 months of probation upon release, restitution, and fines of $10,200.

Additionally, Alexander Koltovskoy, a/k/a Alexander Kolt (Kolt), applied for and received a BRG on behalf of Alexander Edwards Global Search, Inc. Kolt claimed that Alexander Edwards Global Search, Inc., was located at 2 WTC on September 11th. However, HUD-OIG determined that Alexander Edwards Global Search, Inc., moved out of 2 WTC in 1999. Kolt was tried, convicted, and sentenced to 51 months incarceration, three years supervised release, $373,228 in restitution, and a special assessment of $1,800.

B. Hurricane Frauds

In many ways the aftermath of Hurricanes Katrina, Rita and Wilma resembles the September 11th recovery, except on a much larger scale in terms of geographic breadth, amount of assistance appropriated, and volume of frauds coming to light. As of January 2008, HUD-OIG has opened 350 investigations of hurricane-related fraud; of these, 115 have resulted in indictment and 74 in conviction. We are also working with the Department of Homeland Security-OIG to address an additional 577 rental assistance disaster fraud cases that involve duplication of assistance payments. Further, HUD-OIG—as alluded to above—anticipates the imminent referral of an additional 6,771 complaints relating to DHAP recipients falsely claiming subsidies for residences that they do not occupy. Examples of HUD-OIG's work follow.

Using Federal disaster assistance, the Mississippi Development Authority (MDA) administered the Mississippi Homeowner's Grant Program (HGP), which was designed to provide financial assistance to homeowners outside of the Federally-designated flood plain whose homeowner's insurance did not cover structural flood damage. Under HGP, homeowners may receive up to $150,000 or the insured value of their home multiplied by the percentage of damage the home received (whichever is less), less any insurance or FEMA payments received for structural damage. To be eligible for assistance a home had to be a primary residence of the applicant at the time of the hurricane. HUD-OIG has received numerous referrals from MDA concerning applications that they believe are fraudulent. For instance, Phillip A. Winchester applied for HGP assistance with respect to a property located at 111 Oakview Avenue, Long Beach, MS. However, HUD-OIG determined that his actual residence was located at 116 Oakview Avenue, Long Beach, MS, and that 111 Oakview Avenue was a secondary property that Winchester had inherited upon his mother's death. 111 Oakview Avenue suffered significantly greater damage from the hurricane, and was not properly insured. The investigation further revealed that Winchester filed fraudulent applications for FEMA, SBA, and United States Department of Agriculture (USDA) assistance. Winchester pled guilty and was sentenced to five months confinement, restitution, a fine, and 24 months probation.

Likewise, William and Deane Palmer's primary residence was in Lakeland, FL, when Hurricane Katrina struck the Gulf Coast. The Palmers also owned two rental properties in MS. Following the storm, the Palmers applied for an HGP for a rental property they owned in Ocean Springs, MS. The Palmers also filed fraudulent applications for FEMA and SBA assistance. William Palmer pled guilty, and was sentenced to 18 months incarceration, three years of supervised release, restitution, and a fine.

Louisiana's corollary to Mississippi's HGP program is its Road Home Program. At the time of Hurricane Rita, Barbara Robicheaux was employed by the Louisiana Department of Motor Vehicles. Immediately after the storm, the Louisiana State Police temporarily suspended the issuance of new State identification cards and driver's licenses, anticipating attempts to misrepresent residential information. Robicheaux asked a co-worker to create a new State identification card for her, displaying the address of a property that she owned at the time of Hurricane Rita but that was not her primary residence. Robicheaux then presented the new fraudulent State identification card as proof of residency, when applying for assistance under the Road Home Program. An investigation also revealed that Robicheaux filed fraudulent applications for FEMA, SBA, and USDA assistance. Robicheaux has entered a guilty plea, but has not been sentenced yet.

Nonetheless, these cases do not necessarily represent the likelihood of disaster fraud prosecutions in general. Many of disaster fraud referrals that we have received following September 11th and along the Gulf Coast do not involve multiple frauds exceeding $120,000 (see Section 2B1.1(b)(1)(F) of the Federal Sentencing Guidelines) against multiple agencies as the majority of the above-referenced cases did, and, thus, they have not been and will not be prosecuted, among other reasons, because of the low dollar loss to the government or because an alternative trigger for an offense level enhancement is not present.

The Costs of Fraud Recovery

On the basis of Congressional directions, the HUD Office of Community Planning & Development, Office of Community Development Block Grants (CDBG), has obligated $13.25 million for oversight of billions of dollars of community development and disaster recovery funds destined for the Gulf Coast. CDBG has been concentrating on the States of Louisiana and Mississippi, which received 80% of the funds. CDBG conducts oversight through an electronic reporting system, monitoring reviews, and the use of a risk analysis contractor. To carry out this effort the CDBG Disaster Division increased its staff from two to 11 persons. Similarly, as discussed above, PIH administers FEMA's DHAP program, under a $565 million interagency agreement. Over $14.75 million of the DHAP agreement funding covers administration and oversight. Additionally, HUD-OIG has received $16 million in supplemental appropriations to augment HUD-OIG's resources in the Gulf Coast and defray operating costs associated with monitoring the nearly $20 billion in HUD disaster assistance circulating there. Currently, HUD-OIG has 33 auditors and investigators dedicated to detecting disaster fraud in Louisiana and Mississippi. The Gulf States have also devoted a significant portion of the HUD disaster assistance—approximately 5%—for fraud prevention and detection.

The costs of CDBG, PIH, HUD-OIG, and the states' fraud prevention and detection efforts are considerable, and failing to recognize them undervalues the relative impact of disaster fraud.

Conclusion

As a consequence of the September 11th terrorist attack, Hurricanes Katrina, Rita and Wilma, and other natural disasters, HUD-OIG has become increasingly concerned about the vulnerability of Federal disaster assistance to fraud. HUD-OIG is convinced that DOJ's proposal to enhance the offense level for disaster fraud will improve the likelihood of prosecution of disaster fraud cases and increase deterrence, and accordingly will reduce the vulnerability of disaster assistance to fraud. Additionally, HUD-OIG is encouraged that DOJ's proposal recognizes the substantial resources that the Federal government invests in fraud recoveries associated with disasters. These funds represent real losses to both the government and the intended beneficiaries of the assistance, and they rightly should be treated as losses.

Sincerely,

Kenneth M. Donohue
Inspector General

TEALA J. BREWER
VICE PRESIDENT
INVESTIGATIONS, COMPLIANCE AND ETHICS
AMERICAN RED CROSS

PRESENTED TO THE
UNITED STATES SENTENCING COMMISSION

February 13, 2008

INTRODUCTION

Chairman Hinojosa, distinguished members of the Commission, thank you for allowing me the opportunity to testify. It is a pleasure to appear here and speak to you regarding the issues faced by the American Red Cross concerning disaster related fraud. I would like to express my appreciation on behalf of the Red Cross for the Commission's efforts to recognize the significant impact that fraudulent activity can have on the organization. I have some other members from the Red Cross with me today. I may need to call upon them to answer a specific question that you may have.

Fraud involving disasters can create an impression with the public that may have serious and long-lasting effects on the Red Cross and its ability to achieve its mission. The mission of the Red Cross is to provide relief to victims of disasters and help people prevent, prepare for, and respond to emergencies. When the funds donated by a generous public are siphoned off by criminals instead of reaching the individuals devastated by a disaster that mission is threatened. The functions of the Red Cross make fraud in the disaster relief context different from other offenses addressed in USSG § 2B1.1 for a number of reasons. First, the direct consequence of fraud during disaster relief is that less money is available for victims if it is diverted by those who are not entitled to it. Second, there exist finite resources available to help those in need during a disaster. In addition, those resources may not be given to the Red Cross in the first place, if donors fear there will be fraud. These factors, among others, make fraud in the disaster relief context an additional burden on Red Cross clients who are the real victims of fraud.

In our experience, individuals who commit disaster fraud can come from a variety of sources. For example, in the early hours or days of a disaster unscrupulous people may set up phony websites or organizations that improperly use the Red Cross name or emblem. These appear to be the Red Cross. In other cases, the fraudulent actors, may be from the affected community or have some current or previous connection to it. A common type of that disaster fraud is an individual who lives in an unaffected residence but previously lived in an area affected by the disaster. These individuals 'prove' residence by presenting a driver's license with their previous address. Often neighbors, family members or vendors who are aware of the true residence of these individuals and are outraged by this abuse of funds needed by others and report the fraud to Red Cross.

IMPACT OF FRAUDULENT ACTIVITY ON THE RED CROSS

The Red Cross is an integral member of the first response community, with expertise in meeting the human needs associated with disasters. Through partnerships with governmental entities and non-governmental organizations the Red Cross provides emergency shelter, food and other mass care services as well as short-term financial assistance to address basic, disaster-caused human needs. During Hurricane Katrina, the Red Cross responded to this tragedy by providing temporary shelter and financial aid to eligible clients to assist them during this difficult transition. Disaster victims are disempowered by the often unpredictable and uncontrollable destruction of their community, home and daily living. These vulnerable individuals and their plight always stir the compassion of our country, prompting many to contribute money or volunteer time to help relief the victims' suffering. The Red Cross plays a vital role in channeling these expressions of compassion into directly meeting the emergency needs of disaster victims.

Among the core values of the Red Cross is stewardship–providing the greatest fiduciary care of the dollars and other resources entrusted to it by its donors. The Red Cross must instill confidence in its donors which begins with the proper use of funds meant to provide assistance to disaster victims. Those who improperly take the money given by donors to alleviate the suffering of people in need strike at the core values of the Red Cross. While FEMA, the American Red Cross and other voluntary agencies active in disaster are often viewed as the victims of disaster fraud, the effects of fraudulent activity reach far beyond the agencies administering relief funds. The most adverse effects of disaster fraud are felt by the victims of the disaster who have lost their homes, are living in a community with a devastated infrastructure, and who may have lost, temporarily or permanently, their means to survive without assistance.

One case of fraud provides a useful illustration. Beginning on or about September 9, 2005 until on or about December 19, 2005, Shirann Everett traveled to various Red Cross chapters and shelters in Mississippi, Georgia, and Florida. Although only eligible for assistance once in the amount of $1,565.00, she applied for and received assistance eight times in the amount of $12,749.00. The assistance was disbursed in the following manner: one Traveler's Check, two Client Assistance Cards (CAC), and five checks negotiated and received on-site. In her applications for assistance, Ms. Everett used two different addresses. She claimed the same dependents all throughout the eight applications she made.

Ms. Everett was charged and pursuant to a plea agreement, entered a guilty plea to one count of Wire Fraud in the United States District Court for the Southern District of Mississippi. On January 16, 2008, the Court sentenced Ms. Everett to a term of probation of five years. She was also ordered to pay restitution to the American Red Cross in the amount of $12,749.00. The maximum amount available for financial assistance during our response to Hurricane Katrina was $1,565.00 based upon the number of people in the household on a one time only basis. The $12,749.00 improperly obtained by Ms. Everett represents donor dollars unavailable to others in need of the funds.

In another example, beginning on or about September 22, 2005 until on or about November 11, 2005, Majorie Jordan fraudulently obtained $25,040.00 in financial assistance from Red Cross chapters and shelters in Mississippi and Louisiana. Ms. Jordan applied and received assistance eighteen times and claimed four different dependents. The assistance consisted of four checks, two Client Assistance Cards, eight Discover pre-loaded debit cards, and four checks from a third-party vendor. Ms. Jordan certified in at least 11 applications that she had not received financial assistance at any other Red Cross locations. On August 9, 2007, Majorie Jordan was charged in a four-count indictment with mail fraud in relation to a series of financial assistance applications she submitted to the American Red Cross in the United States District Court for the Eastern District of Louisiana. On October 18, 2007, Ms. Jordan entered a guilty plea pursuant to a plea agreement. Sentencing has been set for February 20, 2008.

Finally, beginning on or about September 9, 2005 through on or about December, 2005, the Renada Thornton traveled with other individuals to various Red Cross chapters and shelters in Louisiana, Georgia, Mississippi, and Alabama. Ms. Thornton obtained assistance thirteen times, claiming the multiple dependents. She received a total of $18,580.00 consisting of seven checks, three disbursing orders, one pre-loaded Master Card, one pre-loaded debit VISA card, and one money order. On January 10, 2008, Ms. Thornton entered a plea of guilty to six counts of wire fraud and one count of mail fraud. Sentencing has been scheduled for April 10, 2008. While Ms. Thornton was the only viable defendant who could be charged, other individuals were involved with her in obtaining money from the Red Cross representing a significantly higher dollar amount, approximately $117,306.00. Each of these cases represents donor dollars that should have gone to the victims of disaster but were instead used by criminals.

IMPACT ON FUTURE DISASTERS

Many individual and corporate Red Cross donors have expressed serious concerns regarding the theft of disaster relief benefits following the 2005 Hurricane Season. The Red Cross is deeply concerned about the erosion of the public's trust that may occur as a result of the fraudulent activity occurring after the 2005 Hurricane Season. Since Katrina, the Red Cross made improvements to its data systems to identify clients who have already received assistance. But we know fraud can still occur with changed names, dependents, and addresses. The Red Cross is not a government agency; it relies on voluntary donations of time, money, and blood to accomplish its goals. We depend almost entirely upon a generous public to supply the financial donations that enable us to provide relief to the victims of disasters. Any action that erodes public trust in the Red Cross, therefore, has a direct effect on the willingness of the public to volunteer time, donate blood, and make financial contributions to these vital activities. Any decreased willingness on their part, in turn, means that the Red Cross may not have the necessary resources needed to meet the needs of disaster victims and other members of the community.

As a practical matter, the Red Cross may never be able to recoup the funds that were taken by criminals. Even when the Red Cross is awarded court-ordered restitution the defendant could take months or years to make payments, if he or she makes them at all. Often defendants pay only a portion of their court-ordered restitution based upon their ability to pay. As a result the effects of this fraud can last for years for the Red Cross.

The Red Cross must be prepared to meet the challenges it will face in responding to future disasters. To meet those challenges, the Red Cross must have the trust of the donating public and its volunteers. Therefore, the action taken by the Sentencing Commission is of great significance to the Red Cross and its ability to sustain the financial and volunteer resources needed to accomplish its mission.

OVERSIGHT/COMPLIANCE EFFORTS

The intended beneficiaries of disaster relief funds have no ability to prevent others from diverting the resources needed for their recovery. The relief agencies that provide the assistance to the affected community have a duty to protect those resources. The Red Cross is committed to meeting its responsibility to ensure that the right disaster victims receive the maximum benefit from each donated dollar. To that end, the Red Cross is fully supportive of the prosecution of those who have created these fraudulent schemes designed to take advantage of the organization in the midst of responding to a crisis as part of our compliance effort. In addition to restitution, we hope to deter future perpetrators from embarking on their own fraud schemes by pursuing those who commit fraud. As a result of one well publicized case in Bakersfield, California, the Red Cross received over 2.5 million dollars back voluntarily from those who improperly received it.

Under the direction of the Vice President, Investigations, Compliance and Ethics (ICE), ICE is dedicated to protecting, supporting and enforcing the integrity of relief operations. ICE actively engages in fraud deterrence and detection through a program of daily electronic surveillance of the client assistance system for unusual activity and duplicate client names and addresses in level four and five disaster events. Instances of unusual activity, such as high dollar amounts of assistance, large households and duplicate cases are researched immediately. In addition, ICE educates caseworkers about how to prevent and detect fraud. Suspected fraud cases are investigated immediately. Funds on disaster debit cards are often suspended when circumstance are particularly suspicious. While the Red Cross is committed to investing resources in detecting fraud, this causes us to spend enormous sums in prevention activities each year that would otherwise be utilized elsewhere within out limited budget.

CONCLUSION

That concludes my prepared remarks. Once again, thank you for the opportunity to appear here today and for your consideration of these significant issues. The Red Cross is prepared to assist the Commission as this process moves forward. I will be glad to answer any questions.