

## APPENDIX B



U.S. Department of Justice  
Criminal Division

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Office of the Assistant Attorney General

Washington, DC 20530-0001

March 27, 2008

The Honorable Ricardo H. Hinojosa  
Chair, U.S. Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, DC 20002-8002

Dear Judge Hinojosa:

On behalf of the Department of Justice, we submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register in January 2008. We appreciate the opportunity to comment upon these amendments and look forward to continuing to work with the Commission on these and other issues that will arise during the next year to ensure a fair sentencing guidelines system.

### **1. Repromulgation of the Emergency Disaster Fraud Amendment**

Congress passed the *Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007*, Pub. L. 110-179, on December 19, 2007, and it was signed into law by the President on January 7, 2008. The Commission promulgated an emergency amendment, effective February 6, 2008, that responded to the directive in section five of the Act. We believe that emergency amendment should now be made permanent with certain changes.

At a public hearing on February 13, 2008, United States Attorney David Dugas outlined the Department of Justice's views on the amendment and the issues for comment presented by the Commission in the *Proposed 2008 Guideline Amendments*. In his testimony, Mr. Dugas explained that the Act was passed to reverse the perception by some that they could make fraudulent claims in emergency situations, remain undetected and, even if caught, go relatively unpunished. As Senator Sessions noted at the time the bill was passed, "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." S. Rep. 110-69, at 4-5 (2007). In passing the Act, Congress recognized that, 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. The concerns raised by Congress are reflected in the increased penalties for these offenses.

In response to this legislation, the Commission took a significant first step in addressing the concerns by including as part of the emergency amendment a specific offense characteristic (SOC) directing a two-level increase “[i]f the offense involved fraud or theft involving any benefit authorized, . . . in connection with a declaration of a major disaster or emergency.” U.S.S.G. § 2B1.1(b)(16). This SOC, however, would rarely result in a sentence of imprisonment and is therefore insufficient in many cases to achieve the goals of sentencing in 18 U.S.C. § 3553 or Congressional intent.<sup>1</sup>

We believe that an essential next step is to establish a minimum base offense level, or “floor” for these cases. Establishing a floor will reflect the seriousness of the offense and is consistent with both Congressional intent and the general framework of the guidelines. We submit that a floor of an offense level 14 is appropriate as it is commensurate with the other existing SOCs for which a “floor” has been established and will assure that those convicted of disaster fraud likely will receive an appropriate sentence involving some term of incarceration.<sup>2</sup> The Department’s experience in prosecuting these cases demonstrates 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. For example, because sentences have been based upon the fraud table in section 2B1.1(b)(1), first-time offenders generally have been sentenced to probation and fined an amount equivalent to the disaster assistance funds that they fraudulently obtained, even though they may be part of a larger scheme that involves multiple claims for relatively small amounts from a number of false claimants. These probationary sentences do not adequately reflect

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<sup>1</sup> For example, many of these offenders commit frauds involving less than \$10,000 of loss and would have a total offense level of 11 under the current guideline. Thus, only in those cases where the “loss” exceeds \$10,000 would some period of imprisonment be recommended.

<sup>2</sup> Section 2B1.1 provides for the following “floors”: single acts of fraud committed during bankruptcy proceedings or involving financial assistance for certain student loans are set a minimum level of 10; if a substantial part of the fraudulent scheme was committed outside of the United States the minimum level is 12; 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. 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 section 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 harm caused by these offenses, do not achieve specific or general deterrence and are not consistent with Congress' intent to treat these offense seriously.

These cases are different from other types of government benefit-related fraud, such as unlawfully obtaining social security benefits or welfare fraud. These other fraud offenses are not triggered by a catastrophic event that requires the quick disbursement of funds and services and without some of the typical safeguards. In order to be effective in times of disaster, the aide delivery system must be immediate and, thus, must rely on the honest representations of the applicant. Those that use these emergency situations for their own personal profit commit a far more serious offense than those who try to exploit the typical delivery systems, which generally have well-established verification procedures in place and do not require rapid response and disbursement. Congress recognized these differences by increasing the maximum penalty to 30 years, far higher than the maximum for those statutes generally used to prosecute social security or welfare fraud.<sup>3</sup> Because of the nature of the triggering events, these frauds receive much greater public scrutiny and therefore minimal sentences have two deleterious effects. First, they discourage contributors who see that donations are being wasted and that those who undeservedly obtained the funds are receiving little punishment. Second, the current relatively light punishment imposed for disaster fraud encourages the belief that the potential benefits from such fraud far outweigh any possible punishment.

During the hearing, some expressed concern as to whether offenders who may also have been victims of the major disaster or emergency should be treated differently than individuals were not victims. While the suggestion to create a specific departure for "victims" of disaster fraud may have some appeal, we believe the identification of "victims" and the interrelationship between the fraud and "victimization" is, in reality, extremely complex and not susceptible to such generalizations. By definition, those offenders subject to this guideline are not mere victims, but instead have been found criminally liable for defrauding a benefit organization in connection with a declared disaster. The following are some examples of recent cases that have been prosecuted that some may deem to be "victims," yet the offenders were involved in substantial frauds that might well have been even greater but for their being caught.

- *United States v. Thalisha Davis*, CR-07-171-FJP, (M.D. La.): Davis was an evacuee from New Orleans who received over \$19,000 from the Federal Emergency Management Administration (FEMA) on her first disaster assistance application filed in her own name. Davis then filed two additional applications in the name of "Thalisha Smith," using two social security numbers assigned to other individuals. She admitted in Court that she fabricated the Social Security numbers used in the

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<sup>3</sup> See generally 18 U.S.C. § 1001(False Statements) (establishing a five year maximum); § 1028 (Identification Fraud)(establishing a 15 year maximum); § 1029(Access Device Fraud) (establishing a 10 and 15 year maximum); § 1341(Mail Fraud not related to a major disaster) (establishing a 20 year maximum); and §1343(Wire Fraud not related to a major disaster) (establishing a 20 year maximum).

applications without knowing to whom the numbers were assigned. Davis obtained over \$14,000 on the second application, and was set to receive approximately the same amount on her third application, but FEMA discovered the fraud prior and cancelled the checks before they were cashed. Ms. Davis was also charged with and pled guilty to fraudulently obtaining Disaster Unemployment Assistance (DUA) by falsely reporting that she lost her job because of Hurricane Katrina. Ms. Davis awaits sentencing on these charges.

- *United States v. Edward Good*, H-06-47, (S.D. Tx.): Edward Good was an evacuee from New Orleans who relocated to Conroe, Texas. Through the internet, he filed a legitimate claim with the Louisiana Department of Labor for disaster unemployment assistance. Good admitted at his plea hearing that he realized from this first application that it would not be difficult to submit other applications through the internet. He then purchased (using money or drugs) names and social security numbers from Conroe-area residents which he then used to file DUA claims, listing New Orleans employers of which Good was aware. These individuals were not evacuees and had not worked in Louisiana prior to Katrina. At sentencing, the district court determined that Good filed approximately 70 fraudulent DUA applications, had the debit cards sent to his Conroe hotel room, and received more than \$120,000 in fraudulent funds. He was sentenced to 27 months imprisonment.
- *United States v. Bobby Hammond*, H-07-116, (S.D. Tx.): Hammond was an evacuee from New Orleans who relocated to Houston. He filed a legitimate claim for DUA. The evidence at Hammond's trial established that he then filed a second claim for DUA using another's social security number. The DUA program requires a weekly call to verify continued eligibility in order to receive the weekly \$98 benefit on the debit card. The government put forth evidence at trial showing that each week Hammond called to verify eligibility for both cards. To access the second card, each week he had to enter the false social security number used to obtain that card in the first place. The jury convicted Hammond of wire fraud and aggravated identity theft. Hammond is pending sentencing.
- *United States v. Travis Frank and Regina Dewey*, H-07-135, (S.D. Tx.): Frank and Dewey evacuated from the New Orleans area to Houston. Frank filed a claim for Katrina benefits, listing his primary residence of Reserve, Louisiana. FEMA denied this application. According to the agreed factual proffer at the plea hearing in this case, Frank then filed a second application, fraudulently listing a primary residence in New Orleans. FEMA asked for additional information to support his claim of New Orleans residency. Frank admitted at the plea hearing that he created a fraudulent lease and had his girlfriend Dewey forge the signature of a supposed landlord at the address. Dewey admitted that she also wrote a letter, which was faxed to FEMA, supposedly from the landlord falsely stating that Frank had lived at the New Orleans address. FEMA paid \$12,000 after receiving these fraudulent

address verifications. Frank and Dewey split the money. The district court sentenced Frank to ten months imprisonment and Dewey to a term of time served, which was approximately two months.

While in each one of the cases the defendant might qualify as a "victim," we do not believe that a downward departure would be warranted given the amount and/or degree of sophistication in carrying out the fraud. Nevertheless, should the Commission determine that an offender's "victim" status should be given some consideration, rather than a downward departure, we suggest including an application note indicating that the minimum base offense level should not apply if the defendant was legitimately entitled to some portion of the funds and the funds illegally received were only an extension or overpayment of that which he obtained lawfully. The application note should place the burden on the defendant to establish that he was legally entitled to the initial disbursements and should exclude those who (1) fraudulently obtained or sought to obtain \$5,000 or more in benefits and (2) submitted multiple claims to a single agency or submitted claims to multiple agencies.

Finally the Commission sought comment on "whether the proposed specific offense characteristic should include language expanding 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. Due to the same immediate need for services, the contracting process often takes 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 services are desperately needed, yet are susceptible to fraud because of the chaos surrounding the disaster and should be protected by the deterrent effect of increased punishment.<sup>4</sup>

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**FEDERAL PUBLIC DEFENDER  
District of Arizona  
850 Adams Street, Suite 201  
PHOENIX, ARIZONA 85007**

**JON M. SANDS  
Federal Public Defender**

**(602) 382-2700  
(800) 758-7053  
(FAX) 382-2800**

January 8, 2008

Kathleen Grilli  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Dear Ms. Grilli,

Thank you for the opportunity to provide preliminary comments from the Federal Public and Community Defenders on the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, No. S863. Section 2 of S863 creates a new offense at 18 U.S.C. § 1040 for fraud in connection with major disaster or emergency benefits, while sections 3 and 4 add § 1040 offenses to the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343). Each offense is punishable by up to 30 years imprisonment but none imposes a mandatory minimum sentence.

Section 5 of S863 contains a directive to the Commission to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster or an emergency declaration that reflect the serious nature of the offenses and the need for aggressive and appropriate law enforcement action, assure reasonable consistency with other relevant directives and guidelines, account for any aggravating or mitigating circumstances and assure that the guidelines adequately meet the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2).

We believe that U.S.S.G. § 2B1.1 as written adequately accommodates the new offenses set forth in S863. 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. As written, § 2B1.1 allows courts to take such disparate conduct into account at sentencing. 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 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)).

Chapter Three provides additional opportunities to impose a higher sentence where warranted, including permitting 2-to-4 level increases if the offense involved a vulnerable victim (§ 3A1.1(b)), 2-to-4 level increases if the defendant was an organizer, leader, manager or supervisor (§ 3B1.1), and 2-level increases if the defendant abused a position of public or private trust (§ 3B1.3).

As a result of these provisions, guideline sentences for large scale frauds involving disaster benefits could easily reach the statutory maximum in the most serious cases.<sup>1</sup> At the same time, § 2B1.1 permits guideline sentences of between 0 and 6 months for small time offenses involving \$5,000 or less, no aggravating circumstances, and the least culpable defendants (CHC I). As written, § 2B1.1 permits flexibility where appropriate in sentencing first-time minor offenders, while still reflecting the serious nature of disaster fraud offenses by allowing for sentences at or near the statutory maximum for larger operations and more culpable offenders.

In our experience with disaster fraud cases, the cases in the 0 to 6 month range are not part of an organized attempt to defraud anyone. They typically involve 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 are low, and the defendants themselves tend to be indigent single mothers with mental health issues and no prior criminal record.

We are not aware of any empirical justification for requiring that such defendants receive lengthier prison sentences or that they be denied alternatives to incarceration. In fact, the most recent empirical evidence of which we are aware points against incarcerating such offenders. At the most basic level, it costs approximately \$10,000 to imprison a defendant for 6 months, and thus makes little financial sense to deny alternatives to incarceration for those defendants convicted of fraudulently obtaining \$5,000 or less in disaster benefits. Added to the financial cost are longer-term societal costs such as failing to provide needed treatment for mental health issues or removing a

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<sup>1</sup> *Accord United States v. Moreland*, \_\_ F.3d \_\_, 2007 WL 4323046, \*2, 15 (9<sup>th</sup> Cir. Dec. 12, 2007) (fraud convictions for mail and wire fraud and money laundering involving \$55 million loss resulted in guideline range of life for defendant in criminal history category I); *United States v. Henoud*, 228 Fed. Appx. 308, 309-11 (4<sup>th</sup> Cir. 2007) (defendant properly sentenced under guidelines to 360 months in prison for various schemes to defraud businesses and individuals under aegis of purported charity); *United States v. Zidar*, 178 Fed. Appx. 673, 675, 679 (9<sup>th</sup> Cir. 2006) (defendant convicted of conspiring to commit and committing mail and wire fraud and money laundering resulting in \$79 million loss properly sentenced to 30 years, which court considered “equivalent to the life sentence recommended by the Guidelines”).

single parent from his or her children.<sup>2</sup> And fraud offenders tend to be amongst the least likely to recidivate, rendering the costs even less necessary for society to bear than they might be for other non-violent offenses.<sup>3</sup>

As a result of the foregoing, and in the interest of simplification, we recommend that the Commission hold off on amending § 2B1.1 until such time as empirical data suggests that increasing punishments serves any of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).<sup>4</sup> This would guard against what the Commission's Fifteen Year Report calls "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."<sup>5</sup> It would also avoid the problems with past amendments to § 2B1.1, where adjustments have been added on a frequent basis in response to "political pressure," but "without a sound policy basis" or a demonstrated empirical need.<sup>6</sup>

If, despite the foregoing, the Commission decides to amend the guidelines now, we recommend that it add no more than a 2 level increase to § 2B1.1(b) if the offense involved conduct described in 18 U.S.C. § 1040. Such an increase would be comparable to that assigned to offenses involving other national interests, such as theft or destruction of or damage to national cemetery or veterans' memorial property (§ 2B1.1(b)(6)). It would also permit the least culpable offenders – but only the least culpable offenders (e.g., those in CHC I with no aggravating offense characteristics beyond the offense of conviction) – to maintain Zone A eligibility. Offenders with no other aggravating offense characteristics in CHC II – IV would fall within Zone B, while those in CHV V and VI would automatically fall within Zone C.

Very truly yours,

JON M. SANDS  
Federal Public Defender  
Chair, Federal Defender Sentencing  
Guidelines Committee

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<sup>2</sup> For a more fulsome discussion of the financial and societal costs of incarcerating non-violent offenders, see U.S. Congress, Joint Economic Committee Hearing, *Mass Incarceration in the United States: At What Cost?* (Oct. 4, 2007), available at <http://www.jec.senate.gov/Hearings/10.04.07%20Economic%20Cost%20of%20Incarceration.htm>.

<sup>3</sup> U.S. S.C., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf).

<sup>4</sup> Section 5(b)(5) of S863 requires the Commission to "assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code."

<sup>5</sup> U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 137 (citation omitted).

<sup>6</sup> *Id.* at 138 (citations omitted).

**FEDERAL PUBLIC DEFENDER  
District of Arizona  
850 West Adams Street, Suite 201  
PHOENIX, ARIZONA 85007**

**JON M. SANDS  
Federal Public Defender**

**(602) 382-2700  
1-800-758-7053  
(FAX) 382-2800**

March 6, 2008

Honorable Ricardo H. Hinojosa  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

Re: Comments on Proposed Amendments

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed amendments to the United States Sentencing Guidelines, published on January 28, 2008.<sup>1</sup> We also provide our comments on the proposed amendments to the Commission's Rules of Practice and Procedure as they pertain to the Commission's consideration of retroactivity.<sup>2</sup>

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### III. DISASTER FRAUD

The Commission seeks comment on whether it should permanently adopt the temporary amendments to § 2B1.1, which added a two-level enhancement if the offense involved fraud or theft in connection with a major disaster or emergency declaration benefit, and expanded the definition of “reasonably foreseeable pecuniary harm” to include the costs of recovering the benefit to any governmental, commercial, or non-profit entity. It also seeks comment on whether the amendment should be expanded to include contractor, sub-contractor or supplier fraud, and whether any aggravating or mitigating factors exist that would justify additional amendments.

We incorporate into this letter all of the comments we provided in our January 8, 2008 letter to the Commission’s legal staff, as well as the written and oral testimony of Marjorie Meyers, Federal Public Defender, Southern District of Texas, which was submitted to the Commission at the public briefing on February 13, 2008. We continue to believe that USSG § 2B1.1 already adequately accommodates the disaster related fraud offenses and thus oppose making the temporary amendment permanent. As with all other types of fraud, disaster related fraud 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.

#### A. Disaster Fraud Enhancements

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.

A minimum base offense level above the already enhanced seven-level floor contained in § 2B1.1 (for offenses with a maximum statutory penalty of more than twenty years), will create “unwarranted *similarities*” among dissimilarly situated individuals. See *Gall v. United States*, 128 S. Ct. 586, 600 (2007) (emphasis in original). As related in detail in our testimony, individuals convicted of disaster-related fraud range from the

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admission by the Commission that this guideline, at least as applied to low-level drug sellers like Ms. Pruitt, violates the overarching command of § 3553(a) that “[t]he court . . . impose a sentence sufficient but not greater than necessary, to comply with the purposes of sentencing set forth in’ § 3553(a)(2).”)

poverty-stricken, traumatized victims of the disaster to the fraudster who takes advantage of the desperation of both the victims and the service providers. Of note, the testimony of all parties presented to the Commission as well as our own experience reveals that the courts have rarely imposed sentences above the Guidelines in these cases, nor has the government sought any upward departure or variance. This is empirical evidence that the current Guidelines adequately take into account the § 3553(a) factors and there is no need to increase the base offense level in disaster related fraud cases.

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.<sup>16</sup> 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.

In addition, we urge the Commission to reconsider its decision to include as “reasonably foreseeable pecuniary harm” the administrative costs of recovering fraudulently obtained funds that are borne by any government or “or any commercial or not-for-profit entity.” Congress did not direct the Commission to expand the concept of “pecuniary harm” in these cases or otherwise suggest that the existing standard was inadequate, and the Commission should hesitate before undertaking such an expansion on its own initiative. Calculating such costs will be difficult and costly with little likelihood of financial recovery given that many of these defendants are themselves indigent. It also seems entirely unnecessary. To our knowledge, full restitution has been ordered in all cases. Of course, should the aggrieved party remain unsatisfied by the restitution order in any particular case, it remains free to pursue civil remedies against the defendant.

#### **B. Contractor, Sub-Contractor or Supplier Expansion**

The Defenders do not typically represent people or entities accused of committing disaster benefit fraud offenses relating to contractor or supplier work, and thus do not know whether circumstances exist that would caution against expanding the two-level enhancement to cover this type of fraud offense. The PAG is likely the appropriate organization to provide comment on this issue.

#### **C. 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

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<sup>16</sup> 42 U.S.C. § 5122(2).

disaster. Alternatively, the Commission could encourage a downward departure in these circumstances.

**D. 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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**Testimony of Marianne Mariano  
Acting Federal Public Defender  
Western District of New York  
On Behalf of the Federal Public and Community Defenders  
Before the United States Sentencing Commission  
Public Hearing on Proposed Amendments for 2008  
March 13, 2008**

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**III. DISASTER FRAUD**

The Commission seeks comment on whether it should permanently adopt the temporary amendments to § 2B1.1, which added a two-level enhancement if the offense involved fraud or theft in connection with a major disaster or emergency declaration benefit, and expanded the definition of “reasonably foreseeable pecuniary harm” to include the costs of recovering the benefit to any governmental, commercial, or non-profit entity. It also seeks comment on whether the amendment should include an offense level floor, whether the amendment should be expanded to include contractor, sub-contractor or supplier fraud, and whether any aggravating or mitigating factors exist that would justify additional amendments.

We incorporate into this letter all of the comments we provided in our January 8, 2008 letter to Kathleen Grilli, as well as the written and oral testimony of Marjorie Meyers, which was submitted to the Commission at the public briefing on February 13,

2008. We continue to believe that USSG § 2B1.1 already adequately accommodates the disaster related fraud offenses and thus oppose making the temporary amendment permanent. As with all other types of fraud, disaster related fraud 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.

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A minimum base offense level above the already enhanced seven-level floor contained in § 2B1.1 (for offenses with a maximum statutory penalty of more than twenty years), will create “unwarranted *similarities*” among dissimilarly situated individuals. *See Gall v. United States*, 128 S. Ct. 586, 600 (2007) (emphasis in original). As related in detail in our testimony, 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. Of note, the testimony of all parties presented to the Commission as well as our own experience reveals that the courts have rarely imposed sentences above the Guidelines in these cases, nor has the government sought any upward departure or variance. This is empirical evidence that the current Guidelines adequately take into account the § 3553(a) factors and there is no need to increase the base offense level in disaster related fraud cases.

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.<sup>5</sup> 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.

In addition, we urge the Commission to reconsider its decision to include as “reasonably foreseeable pecuniary harm” the administrative costs of recovering fraudulently obtained funds that are borne by any government or “or any commercial or

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<sup>5</sup> 42 U.S.C. § 5122(2).

not-for-profit entity.” Congress did not direct the Commission to expand the concept of “pecuniary harm” in these cases or otherwise suggest that the existing standard was inadequate, and the Commission should hesitate before undertaking such an expansion on its own initiative. Calculating such costs will be difficult and costly with little likelihood of financial recovery given that many of these defendants are themselves indigent. It also seems entirely unnecessary. To our knowledge, full restitution has been ordered in all cases. Of course, should the aggrieved party remain unsatisfied by the restitution order in any particular case, it remains free to pursue civil remedies against the defendant.

#### **B. Contractor, Sub-Contractor or Supplier Expansion**

The Defenders do not typically represent people or entities accused of committing disaster benefit fraud offenses relating to contractor or supplier work, and thus do not know whether circumstances exist that would caution against expanding the two-level enhancement to cover this type of fraud offense. The PAG is likely the appropriate organization to provide comment on this issue.

#### **C. 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.

#### **D. 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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# PROBATION OFFICERS ADVISORY GROUP

## to the United States Sentencing Commission

Suzanne Ferreira,  
Chair, 11<sup>th</sup> Circuit

U.S. Probation Office  
300 NE 1st Ave Rm 315  
Miami, FL 33132

Tel: 305-523-5423



Jennifer D. Sinclair, 1<sup>st</sup> Circuit  
Jineen M. Forbes, 2<sup>nd</sup> Circuit  
Douglas S. Moyle, 3<sup>rd</sup> Circuit  
Yolanda Burton, 4<sup>th</sup> Circuit  
Gail Winkler, 5<sup>th</sup> Circuit  
Philip R. Miller, 6<sup>th</sup> Circuit  
Lisa Wirick, 7<sup>th</sup> Circuit  
Rebecca Chaiken, 8<sup>th</sup> Circuit  
Teresa M. Brantley, 9<sup>th</sup> Circuit  
Bryce J. Beckett, 10<sup>th</sup> Circuit  
Deborah Stevens-Panzer DC Circuit  
Cinnamon Ornelas, FPPOA Ex-Officio  
John Fitzgerald, OPPS Ex-Officio

March 10, 2008

The Honorable Ricardo H. Hinojosa, Chair  
United States Sentencing Commission  
Thurgood Marshall Building  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20008-8002

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### Emergency Disaster Fraud

The group reviewed the recommended SOC and considered the option of including a minimum offense level. The minimum offense level is not recommended unless it differentiates between defendants who were actual victims of the disaster, but received more benefits than that to which they were entitled, and non-victim defendants who exploited the disaster by using the opportunity to seek disaster benefits to which they were not entitled. The group concluded that the 2 level increase is adequate for defendants who were victims of the disaster.

As to other aggravating and mitigating circumstances that might justify additional adjustments, the group expressed concern that the adjustment for number of victims found at §2B1.1(b)(2), as currently defined, may not be employed in disaster relief fraud as the victim is usually *one* agency or relief organization that services many people. Under the current definition of victim, only the agency or organization would be considered a victim. This would not account for cases in which an organization is defrauded of large sums of money or where the defendant collected large sums of money under the pretense of acting on behalf of a charitable organization, thereby diverting funds from the intended victim recipients, who do not meet the definition of "victim" under the guidelines. The group suggested consideration of a special rule similar to the one found in §2B1.1, comment. [n.4(C)(ii)] to account for the multiple victims of the offense. The rule should exclude any defendants who were victims of the disaster and received more relief than that to which they were entitled.

\* \* \*



# Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 7, 2008

Honorable Ricardo H. Hinojosa, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002

**RE: Response to Request for Comments on Proposed Amendments for 2008**

Dear Judge Hinojosa:

On behalf of the Practitioners Advisory Group, we submit the following comments on the Commission's various proposed amendments and requests for comment for the 2008 amendment cycle. We look forward to addressing some of these proposals at the Commission's hearing, on March 13.

## **1. EMERGENCY DISASTER FRAUD AMENDMENT**

The Commission requests comment on issues related to the recent emergency amendment to § 2B1.1 resulting from the Emergency and Disaster Assistance Fraud Penalty Enhancement Act. The PAG believes that the Commission's recent amendment, as directed by the Act, addresses sufficiently the concerns that prompted the legislation. With one possible exception, further amendments should not be considered until the Commission has accumulated a greater body of experience.

There are three issues for comment. The first is whether the Commission should add a minimum offense level to the new specific offense characteristic for this type of offense. As the guideline now stands, any offense involving fraud or theft in emergency or disaster relief will generate a minimum offense level of 9 (base level of 7 plus the new 2-level enhancement pursuant to § 2B1.1(b)(16)). Within the current Manual, the most closely analogous specific offense characteristic containing a minimum offense level is for fraud involving, *inter alia*, misrepresentations that the defendant was acting on behalf of a charitable organization or government agency. For such conduct, there is a minimum offense level of 10. § 2B1.1(b)(8)(A). A similar floor for the new offense is unnecessary. The difference between a minimum of 9 and a minimum of 10 is too small to warrant an amendment. (Under the enhancement for charitable organization or government agency misrepresentations, an offense level of 8 is possible, so the argument for a floor of 10 in those cases is stronger.) Moreover, with an intended or actual loss of anything greater than \$5,000, the offense level for emergency or disaster relief fraud will be at least 11. U.S.S.G. §§ 2B1.1(a)(1), (b)(1)(C). An amendment affecting the lowest-level cases, where the intended loss is less than \$5,000, is unwarranted.

The second issue is whether the 2-level enhancement should be expanded to fraud or theft involving a benefit paid, etc., in connection with a 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

Honorable Ricardo H. Hinojosa, Chair  
March 7, 2008  
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or supplier on a contract in which there is a prime contract with the United States.” Such an amendment might be warranted. We are aware of no principled basis for treating emergency or disaster relief fraud by contractors or subcontractors in connection with a procurement of property or services different than emergency or disaster relief fraud by others. The addition of this language promotes consistency.

The third request for comment is whether aggravating or mitigating circumstances should be added for disaster fraud cases. Although we agree with the testimony at the Commission’s February 13, 2008 hearing that fraud by victims of disasters or emergencies should warrant a mitigating adjustment, there is much to be said for leaving the recently amendment guideline as is until some experience can be gathered through, among other things, an analysis of sentences imposed under the Act, in particular whether, why and to what extent courts are deviating from the recommended guideline ranges. There is more reason now than when the guidelines were mandatory for the Commission to wait for data before making adjustments that may further complicate the guidelines or otherwise prove ill-advised.

Finally, the PAG understands at least one organization is proposing that § 2B1.1 incorporate language concerning the appropriateness of a lesser sentence (*i.e.*, downward departure) in cases where the defendant was an actual victim of a natural disaster. The PAG supports judicial recognition of instances where the personal consequences of a disaster influenced, and potentially mitigate, a defendant’s offense behavior so as to offset the enhancement required under § 2B1.1(b)(16).

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