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*Report to the Congress:*

**AMENDMENTS TO THE FEDERAL SENTENCING  
GUIDELINES IN RESPONSE TO THE  
EMERGENCY DISASTER ASSISTANCE FRAUD  
PENALTY ENHANCEMENT ACT OF 2007**

(As required by section 5(a)(2) of the Emergency Disaster Assistance Fraud Penalty  
Enhancement Act of 2007, Public Law 110–179)

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UNITED STATES SENTENCING COMMISSION

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This Report responds to the directive in the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007 (the "Disaster Fraud Act"), Pub. L. No. 110-179, 121 Stat. 2556, signed by the President on January 7, 2008. The Report discusses the Disaster Fraud Act and its legislative history and explains the actions taken by the U.S. Sentencing Commission ("Commission") pursuant to the congressional directive in the Disaster Fraud Act and the Commission's policy recommendations for combating disaster fraud offenses.

## **I. EMERGENCY AND DISASTER ASSISTANCE FRAUD PENALTY ENHANCEMENT ACT OF 2007**

Relevant to this Report are provisions in the Disaster Fraud Act that directed the Commission to take certain actions, created a new fraud offense, and increased penalties for existing fraud offenses. These issues are described in more detail below.

### **A. Directive to Commission**

The Disaster Fraud Act was signed by the President on January 7, 2008. Section 5(a) of the Disaster Fraud Act contains a 30-day directive to the Commission – with the requisite emergency amendment authority – providing that the Commission "forthwith shall –

- (1) promulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses 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); and
- (2) submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives an explanation of actions taken by the Commission pursuant to paragraph (1) and any additional policy recommendations the Commission may have for combating offenses described in that paragraph."

Section 5(b) of the Disaster Fraud Act further requires the Commission to –

- (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses;
- (2) assure reasonable consistency with other relevant directives and with other guidelines;

- (3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;
- (4) make any necessary conforming changes to the sentencing guidelines; and
- (5) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

## **B. New Offense**

Section 2 of the Disaster Fraud Act adds a new offense at 18 U.S.C. § 1040 (Fraud in connection with major disaster or emergency benefits). The new offense provides that whoever knowingly –

- 1) falsifies, conceals, covers up by any trick, scheme, or device any material fact; or
- 2) makes any materially false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation, in any matter 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)<sup>1</sup> or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5191),<sup>2</sup> or 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 under a contract in which there is a prime contract with the United States.

The penalties for violating this statute include fines and imprisonment for a term not to exceed 30 years. The term “benefit” is defined in the statute as “any record, voucher, payment, money or thing of value, good, service, right, or privilege provided by the United States, a State or local government, or other entity.”

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<sup>1</sup> 42 U.S.C. § 5170 sets forth the procedures for states to request that the President declare that a major disaster exists. It requires a request to be made by the Governor, “based on a finding that the disaster is of such severity and magnitude that the effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.” “Based on the request of a Governor under this section, the President may declare under this chapter a major disaster or emergency exists.”

<sup>2</sup> 42 U.S.C. § 5191 also sets forth the process for requesting an emergency declaration, which results in emergency assistance programs. Section 5191 also gives the President authority to provide emergency assistance and emergency assistance programs without the specific request of the States.

### C. Increased Penalties

Sections 3 and 4 of the Disaster Fraud Act expand the category of fraud offenses subject to a 30-year statutory maximum under 18 U.S.C. §§ 1341 (Frauds and swindles) and 1343 (Fraud by wire, radio, or television) to include fraud during and in relation to a presidentially declared major disaster<sup>3</sup> or emergency.<sup>4</sup>

## II. LEGISLATIVE HISTORY OF THE DISASTER FRAUD ACT

The Disaster Fraud Act was enacted in response to "concerns that the current provisions of title 18, United States Code, do not adequately address or deter fraud in connection with emergency and disaster assistance." S. Rep. No. 110–69. In the wake of Hurricanes Katrina, Rita, and Wilma, Congress appropriated approximately 62.3 billion dollars in disaster assistance. S. Rep. No. 110–69. As of March 8, 2006, the Federal Emergency Management Agency's ("FEMA") allocations for Katrina and Rita related relief totaled approximately 29.8 billion dollars, 13.45 billion dollars of which was allocated to human services, including but not limited to unemployment assistance, crisis counseling, and housing assistance. S. Rep. No. 110–69.

After FEMA began making disaster assistance available to hurricane victims, reports of fraud and abuse began to surface. "These reports included allegations that the recipients of disaster assistance had misused funds to purchase luxury goods, that non-eligible persons had applied for and received benefits, and that criminals had established phony Katrina-related websites to exploit those who wished to contribute to legitimate disaster assistance efforts." S. Rep. No. 110–69.

In June 2006, the Government Accountability Office ("GAO") released a report to Congress detailing fraud and abuse of disaster recovery funds following Hurricane Katrina. U.S. Gov't Accountability Office, *Expedited Assistance for Victims of Hurricanes Katrina and Rita: FEMA's Control Weaknesses Exposed the Government to Significant Fraud and Abuse*, GAO-06-655 (June 2006) ("GAO Report"). The GAO estimated that one billion dollars in improper or fraudulent payments, representing approximately 16 percent of the total claims paid, had been made by FEMA. GAO

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<sup>3</sup> Under 42 U.S.C. § 5122, a "major disaster" means "any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby."

<sup>4</sup> Under 42 U.S.C. § 5122, an "emergency" means "any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."

investigators testified that the cost of the fraud committed after Katrina and Rita would amount to billions of dollars. S. Rep. No. 110–69.

In response to the increased instances of fraud following these disasters, then Attorney General Alberto Gonzalez announced the formation of the Hurricane Katrina Fraud Task Force. "As of August 30 , 2007, the Task Force has prosecuted more than 768 individuals in 41 judicial districts around the country, and additional state and local prosecutions for disaster-related fraud have been brought." U.S. Department Of Justice, *Hurricane Katrina Fraud Task Force Second Year Report to the Attorney General*, 3 (Sept. 2007).

The Senate Report explains that the changes brought by the Disaster Fraud Act were designed to "send a strong message that disaster relief crime is a serious crime." S. Rep. No. 110–69. Congress wants to help "ensure that federal money goes to the right people and does not get stolen by criminals posing as victims." S. Rep. No. 110–69.

### **III. COMMISSION RESPONSE TO DIRECTIVE**

#### **A. Emergency Amendment**

Immediately after enactment of the Disaster Fraud Act, being cognizant of the 30-day directive to issue an emergency amendment, the Commission began reviewing relevant reports, compiling information, and conducting outreach to interested parties in the criminal justice system and agencies and organizations victimized by disaster fraud.

On January 9, 2008, the Commission voted to promulgate an emergency amendment in response to the directive. *See United States Sentencing Commission Guidelines Manual*, Supplement to Appendix C, Amend. 714 (February 6, 2008) (attached as Appendix A). The amendment, which had an effective date of February 6, 2008, added a new two-level enhancement to the fraud guideline, in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) 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.<sup>5</sup> The Commission chose a two-level enhancement because it was consistent with and proportional to other enhancements in the fraud guideline. Most of the enhancements in this guideline require a two-level increase in the offense level, representing an approximate 25 percent increase in the applicable sentencing range. Moreover, this increase was consistent with enhancements for offenses involving similar

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<sup>5</sup>The enhancement did not cover all conduct criminalized in the new statute created by the Disaster Fraud Act , 18 U.S.C. §1040, because the Commission's authority to promulgate the emergency amendment was limited by the directive to cover only the conduct identified in the directive.

harms, such as a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. *See* USSG §2B1.1(b)(8).

The emergency amendment further added a new subdivision (IV) to the application note defining “loss” in §2B1.1, Application Note 3(A)(v)(Rules of Construction in Certain Cases), providing that in disaster fraud cases, “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.” This provision responded to suggestions by the Department of Justice (“DOJ”) that the loss amount in disaster fraud cases should be calculated in a manner similar to procurement fraud cases, and extant Application Note 3(A)(v)(II) applicable to procurement fraud cases includes “reasonably foreseeable administrative costs to the government and other participants . . .” in the calculation of pecuniary harm. Next, the emergency amendment added a new application note to the fraud guideline defining the terms used in the new specific offense characteristic.

Finally, the emergency amendment provided a reference in Appendix A (Statutory Index) of the *Guidelines Manual* for the new offense at 18 U.S.C. § 1040, referencing the offense to §2B1.1, the fraud guideline.

A review of the fraud guideline suggested that low-level fraud cases involving expedited disaster relief would likely fall within offense level 6 or 7, depending on the type of offense charged.<sup>6</sup> Without any aggravating factors, these offenders would all fall within Zone A of the Sentencing Table and would be eligible for a probationary sentence. Thus, the Commission determined that a specific offense characteristic designed to capture fraud resulting from disaster or emergency relief was an appropriate response to the emergency directive.

## **B. Solicitation of Public Comment on Proposed Amendment**

On January 9, 2008, the Commission also voted to publish a proposed amendment re-promulgating the temporary, emergency amendment as a permanent amendment to be submitted to Congress on May 1, 2008, with an effective date of November 1, 2008. *See* 73 Fed. Reg. 4931-4939 (January 28, 2008). The proposed amendment to re-promulgate

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<sup>6</sup>The offense level forms the vertical axis of the Sentencing Table in the *Guidelines Manual*. Each category of offense has a base offense level, which sets the minimum offense level for the offense. The base offense level is then increased (or decreased) by specific offense characteristics triggered by the conduct involved in the offense. These additions (or subtractions) to the offense level are designed to capture the aggravating and mitigating circumstances involved in the particular offense. In fraud cases, for example, the amount of actual or intended loss increases the offense level. Accordingly, an offender who defrauds a victim of \$500,000 would receive a higher offense level than an offender who defrauds a victim of \$5,000.

the emergency amendment was published in the *Federal Register* on January 28, 2008, and included the following issues for public comment, responses to which were due to the Commission on March 28, 2008:

1. Should the proposed amendment re-promulgating the emergency amendment, effective February 6, 2008, that responded to the directive in section 5 of the "Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007," Pub. L. 110–179 (the "Act"), include a minimum offense level in the specific offense characteristic? If so, what would be the appropriate level for the minimum offense level?
2. Should the proposed amendment re-promulgating 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"? Such conduct was criminalized by the new offense at 18 U.S.C. § 1040 created by the Act, but was not specifically included within the scope of the directive granting emergency amendment authority to the Commission.
3. Are there any aggravating or mitigating circumstances existing in disaster fraud cases that might justify additional amendments to the guidelines?

The Commission published the proposed amendment to re-promulgate the emergency amendment and issues for comment and received comment from a variety of sources, most notably the Department of Justice ("DOJ"), the Federal Public and Community Defenders ("FPD"), the Probation Officers' Advisory Group ("POAG")<sup>7</sup> and the Practitioners Advisory Group ("PAG").<sup>8</sup> All of the public comment received is attached in Appendix B.

### **C. Public Briefing and Comments**

In addressing the directive, the Commission obtained input from interested parties in the criminal justice system and agencies and organizations that were victims of disaster fraud to obtain information to guide the Commission's deliberations. Commission staff received briefings from DOJ, the FPD, and the POAG on disaster fraud. Witnesses were invited to speak at a public briefing session on February 13, 2008, to present oral and written statements concerning disaster fraud. The witnesses included a representative from DOJ, the FPD, the U.S. Department of Housing and Urban

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<sup>7</sup>POAG is one of the Commission's standing advisory groups comprised of federal probation officers. The Commission routinely seeks POAG's input on amendments, as it did in this case.

<sup>8</sup>PAG is also one of the Commission's standing advisory groups comprised of members of the defense bar. The Commission routinely seeks PAG's input on amendments, as it did in this case.

Development (HUD), and the American Red Cross. The witness list and written statements are appended hereto as Appendix C. The following is a summary of the input received from these outreach efforts.

## **1. The Department of Justice**

DOJ provided the Commission with anecdotal information concerning the scope of the fraud uncovered in the wake of Hurricanes Katrina, Rita, and Wilma. DOJ advised that approximately 1.7 million persons were displaced as a result of these storms, yet FEMA received 2.5 million applications for disaster assistance. The fraud uncovered included instances where temporary workers at disaster aid agencies, hired to process claims, also filed fraudulent applications for relief.

The Hurricane Katrina Task Force's investigations revealed that organized groups in Oregon, California, Florida, Louisiana, and Mississippi participated in making numerous fraudulent claims. DOJ has cases pending in 41 judicial districts and uncovered instances of serial fraud, where individuals went to various agencies fraudulently seeking different types of relief, or filed numerous fraudulent applications for assistance from one agency. DOJ estimated that there are hundreds of thousands of fraudulent claims that were made.

DOJ informed the Commission that the Federal Bureau of Investigation's ("FBI") cyber division monitors the Internet when a natural disaster is imminent. The FBI discovered domain names being registered even before Hurricane Katrina, with names like Katrinaassistance.com. Following the disaster, the FBI shut down numerous websites fraudulently soliciting donations for hurricane relief. One website, named airkatrina.com, involved an individual pretending to be a pilot transporting medical supplies to the disaster area and assisting in the transport of injured victims. He solicited donations to assist with the purported costs of the flights. The fraud perpetrator posted false stories describing what he claimed to have witnessed during his trips to the area. Before the FBI shut down the website, this individual managed to collect approximately \$48,000 in donations.

DOJ described the process involved in providing disaster relief. FEMA and the Red Cross are charged with giving assistance quickly. In order to do so, they operated on an honor system and provided between \$1,500- \$2,000 per applicant in expedited disaster assistance, without independent verification of the information provided to solicit the relief. Furthermore, the Red Cross operated call-in centers. DOJ advised that the GAO opined that an effective fraud deterrence program should involve (1) adequate verification; (2) good data management; and (3) aggressive, effective prosecutions of fraud offenders. See U.S. Gov't Accountability Office, *Individual Disaster Assistance Programs: Framework for Fraud, Prevention, Detection, and Prosecution*, GAO-06-954T (July 2006). There is, however, an inherent tension between providing immediate relief and requiring adequate verification because the verification process slows delivery of relief. This tension helped contribute to the abuse that occurred after these disasters.

DOJ advised that the Attorney General instructed the field that DOJ would have a zero tolerance policy for disaster fraud cases. Accordingly, DOJ reported that all cases investigated were prosecuted. Many of the fraud cases prosecuted in the wake of Hurricanes Katrina and Rita involved small dollar amounts, insufficient to trigger the loss enhancement in the fraud guideline. Because the cases routinely did not involve other aggravating factors that would trigger other specific offense characteristics in §2B1.1, many of these defendants fell within Zone A or B of the Sentencing Table (which allows for probationary sentences). Thus, the vast majority of offenders received probationary sentences. As a result, in the Middle District of Louisiana, the U.S. Attorney's office has instituted parallel criminal and civil lawsuits in order to obtain restitution orders in the criminal cases and civil penalties in the civil cases.

DOJ also submitted that disaster fraud is unique because of the national and international press coverage that disasters receive. DOJ discovered after Katrina that the criminal fraud cases resulting from disaster relief fraud were not local, but rather involved national and international connections. As a result, prosecutions for fraud were instituted all over the United States after Katrina, and Katrina victims were defrauded by offenders from different areas of the country, such as by contractors or lottery schemes. Disaster fraud arguably has a more widespread impact because all of the disaster relief agencies are potentially affected by the fraud.

DOJ suggested that although disaster relief agencies do not qualify as vulnerable victims under the guidelines, *see* §3A1.1 (Hate Crime Motivation or Vulnerable Victim), they are nevertheless susceptible to fraud in a way analogous to vulnerable victims. When a disaster strikes, these agencies are often not fully staffed to respond to the emergency. Thus, the agencies are forced to hire staff within a short time period and perhaps without the types of controls that might otherwise be applied to hiring situations. Moreover, because of the extraordinary pressure imposed to deliver relief effectively, the agencies are not necessarily able to exert controls that might prevent fraud, because of the inherent tension between fraud controls and expeditious relief discussed earlier.

DOJ asserted that disaster fraud cases are different than other types of government benefit-related fraud, *e.g.*, unlawfully obtaining security benefits, welfare benefits, etc. Disaster funds and services must be disbursed immediately in order to be effective and disbursement is based on the applicant's representation, unlike the typical delivery systems of government benefits which generally have well-established verification procedures in place and do not require rapid response and disbursement. Further, in DOJ's view, disaster frauds receive much greater public scrutiny than do other fraud offenses. DOJ opined that minimal sentences for these offenses have deleterious effects because they discourage contributions from those who see that donations are being wasted and also encourage the belief that the potential benefits from such fraud far

outweigh any possible punishment because those who undeservedly obtained the funds are receiving little punishment.

## **2. The Federal Public and Community Defenders**

The Commission also received public comment from the FPD suggesting that disaster fraud cases involve harms already adequately accounted for by the existing enhancements in the fraud guideline, §2B1.1. In the FPD's view, §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. The FPD stated it was not aware of any justification for requiring that such defendants receive lengthier prison sentences or that they be denied alternatives to incarceration. The FPD stated that the most recent information of which it is aware points against incarcerating such offenders. According to the FPD, 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.

A representative of the FPD at the public briefing session stated that many of those prosecuted for disaster fraud were themselves victims of the hurricane, with little or no criminal history, who had perpetuated the fraud to either obtain basic necessities or because they were recruited by those who took advantage of their plight. In that respect, the FPD stated that incarceration is a punishment greater than necessary to achieve the goals of 18 U.S.C. § 3553(a). The FPD suggested that the defendant's experience as a victim of the disaster should be a mitigating factor that should be included in the amendment. The FPD asserted that §2B1.1 already allows the courts to take into account the wide variety of criminal conduct arising out of disasters, and due to the increased offense levels for wire and mail fraud and the new offense at 18 U.S.C. § 1040, defendants will be subject to a higher alternative base offense level of 7.

As a result, the FPD recommended that the Commission should refrain from amending §2B1.1 until such time as information suggests that increasing punishments serves the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). The FPD recommended that if the Commission amends the guidelines, it add no more than a two-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)). The FPD stated such an increase would also permit the least culpable offenders in Criminal History Category I with no aggravating offense characteristics beyond the offense of conviction to maintain Zone A eligibility. Offenders with no other aggravating offense characteristics in Criminal History

Categories II through IV would fall within Zone B, while those in Criminal History Categories V and VI would automatically fall within Zone C. Finally, the FPD suggested the amendment could either specify that the disaster fraud enhancement should not apply if the defendant was detrimentally affected by the disaster, or the guidelines could encourage a downward departure.<sup>9</sup>

### **3. The U.S. Department of Housing and Urban Development**

A representative of HUD appeared at the public briefing session and stated that the increased offense level for disaster fraud will improve the likelihood of prosecution of disaster fraud cases and increase deterrence, therefore reducing the vulnerability of disaster assistance to fraud. HUD does not expect increased internal controls and fraud prevention mechanisms will be applied to future disasters because of the immediate need for assistance. Stronger penalties for disaster fraud should improve the likelihood of prosecution and deterrence and thus counteract some of the inherent susceptibility of disaster assistance to fraud.

Further, HUD stated that one of its offices has obligated \$13.25 million for oversight of billions of dollars of community development and disaster recovery funds. The costs associated with the fraud prevention and detection efforts are considerable, and failing to recognize them undervalues the relative impact of disaster fraud, HUD stated.

### **4. The American Red Cross**

A representative of the American Red Cross testified at the public briefing session that, in its experience, those who commit disaster fraud come from a variety of sources. Some of the sources include those who set up phony websites or organizations that improperly use the name of the Red Cross. Others were individuals who live in an unaffected area but had previously lived in an affected area who “prove” residence with a driver’s licence with their previous address.

According to the Red Cross, the fraud involving disasters can create a negative impression with the public when the funds donated by the public are siphoned off by criminals instead of reaching the individuals devastated by the disaster. When money is donated to its organization to alleviate the suffering of people in need and then is improperly taken by those who commit fraud, it strikes at the core values of the Red Cross. As a non-government agency, the Red Cross relies on voluntary donations of time, money, and blood to accomplish its goals. Any action that erodes the public trust has a direct impact on the willingness of the public to continue to volunteer and make

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<sup>9</sup>The PAG generally agreed with the FPD’s comments.

financial contributions and potentially leaves the Red Cross without the necessary resources to meet the needs of disaster victims. Even if courts award the Red Cross restitution, it may take defendants months or years to make payments, if payments are made at all, and therefore the effects of disaster fraud can last for years for the Red Cross.

#### **D. Commission's Data Analysis**

Following the public briefing session in February, the Commission requested that witnesses identify disaster fraud cases so that staff could review them. The Commission received a list of approximately 100 cases from the FPD and was able to analyze 54 cases in the Commission's database. The Commission also reviewed 578 other fraud cases from fiscal years 2006 and 2007 sentenced under three statutes: 42 U.S.C. § 1320a-7b (Criminal penalties for acts involving Federal health care programs), 42 U.S.C. § 408 (Penalties [for false statements relating to Social Security]); and 7 U.S.C. § 2024 ([Food Stamp Program] Violations and enforcement).<sup>10</sup>

More than 80 percent of the 54 disaster fraud cases analyzed did not receive a sentencing enhancement based on loss because the offense involved less than \$5,000 of loss. *See* §2B1.1(b)(1). In contrast, almost 60 percent of the other fraud cases analyzed received a sentencing enhancement based on loss as the offense involved loss of \$5,000 or more. The mean and median loss in the disaster fraud cases were \$7,893 and \$2,000, respectively, compared to \$107,930 and \$13,910, respectively, for the other fraud cases relating to government programs. Almost 78 percent of the disaster fraud offenders received a sentence of probation. Over 62 percent of the defendants involving other frauds relating to government programs received a sentence of imprisonment.

#### **E. Commission Vote To Re-promulgate Permanent Amendment**

The emergency amendment that became effective on February 6, 2008 addressed concerns that disaster fraud involves harms not adequately addressed by §2B1.1 by (1) adding a 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; (2) modifying the commentary to the guideline as it relates to the calculation of loss; and (3) providing a reference to §2B1.1 in Appendix A (Statutory Index) for the offense at 18 U.S.C. § 1040 (Fraud in connection with major disaster or emergency benefits) created by the Disaster Fraud Act.

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<sup>10</sup> Staff selected these statutes because a government agency is the victim of the offense. There are a host of other federal statutes that prosecutors can employ to charge a defendant with fraud or theft from a government agency, but many of those statutes cover other types of fraudulent conduct.

On April 16, 2008, the Commission voted to promulgate a permanent amendment re-promulgating the two-level enhancement with several changes, attached hereto in Appendix D. First, the amendment expands the scope of the two-level enhancement to include all conduct described in 18 U.S.C. § 1040. Thus, the amendment expands the scope of the enhancement to include frauds or thefts involving procurement of property or services as a contractor, subcontractor, or supplier, rather than limiting it to the conduct described in the emergency directive from Congress. The limited emergency amendment authority in section 5(a) of the Disaster Fraud Act did not permit the Commission to include such conduct in the enhancement promulgated in the emergency amendment. However, the broader directive in section 5(b) of the Disaster Fraud Act covers all "fraud or theft offenses in connection with a major disaster declaration" prompting expansion of the scope of the enhancement to apply to all conduct described in 18 U.S.C. § 1040. Indeed, all public comment submitted supported expansion of the enhancement to cover all conduct criminalized by the new statute, 18 U.S.C. § 1040. As the PAG noted in its submission, it is not aware of any "principled basis for treating emergency or disaster relief fraud by contractors or subcontractors different than emergency relief fraud by others" and believes the addition of language incorporating these individuals "promotes consistency."

Second, the amendment modifies the enhancement to include a minimum offense level of 12. This minimum offense level responded to the concerns expressed by DOJ and relief agencies that disaster fraud cases involved harms not captured by operation of the loss table in the fraud guideline, §2B1.1. The Commission frequently adopts a minimum offense level in circumstances in which loss as calculated by the guidelines is difficult to compute or does not adequately account for the harm caused by the offense. The Commission studied a sample of disaster fraud cases and compared those cases to other cases of defrauding government programs. This study found that more than 80 percent of the disaster fraud cases received no increase in the offense level due to the amount of monetary loss but in almost 60 percent of the other fraud cases, the offense level was increased due to the amount of loss involved in the case. This analysis supported claims made in testimony to the Commission that the majority of the disaster fraud cases resulted in probationary sentences because the amount of loss calculated under subsection (b)(1) of §2B1.1 had little impact on the sentences.

The Commission also received testimony and public comment identifying various harms unique to disaster fraud cases. For example, charitable institutions may have a more difficult time soliciting contributions because fraud in connection with disasters may erode public's trust in these institutions. Moreover, the pool of funds available to aid legitimate disaster victims is adversely affected when fraud occurs. Further, the inherent tension between the imposition of fraud controls and the need to provide aid to disaster victims quickly makes it difficult for relief agencies and charitable institutions to prevent disaster fraud. All of these factors provide support for a minimum offense level.

The Commission selected a minimum offense level of 12 after considering a variety of factors, including existing enhancements in the fraud guideline. The Commission concluded that committing disaster fraud is more serious than misrepresenting oneself to be acting for a charitable organization, which receives a minimum offense level of 10 under §2B1.1(b)(8), and less serious than causing a conscious or reckless risk of death, which receives a minimum offense level of 14 under §2B1.1(b)(12).

Third, the amendment adds a downward departure provision that may apply in a case in which the minimum offense level applies, the defendant is a victim of a major disaster or emergency, and the benefits received illegally were only an extension or overpayment of benefits received legitimately. The departure provision responded to public comment from the FPD and POAG suggesting that a defendant's status as a victim should be accounted for in the guidelines. This provision recognizes that a defendant's legitimate status as a disaster victim may be a mitigating factor warranting a downward departure in certain cases involving relatively small amounts of loss.

Fourth, the amendment deletes certain commentary relating to the definition of loss that was promulgated in the emergency amendment. Specifically, the emergency amendment added subdivision (IV) to Application Note 3(A)(v) of §2B1.1 providing that in disaster fraud cases, "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." The amendment deletes this provision because of concerns that administrative costs might be difficult to determine or in some instances could over-represent the harm caused by the offense, and the loss is adequately addressed by the use of a minimum offense level.

Finally, the amendment redesignates subsection (b)(16) as subsection (b)(11) and makes conforming changes to the guideline and the commentary.

#### **IV. CONCLUSION**

In responding to the directive, the Commission considered the various factors identified by Congress, including the serious nature of the disaster fraud offenses and the need for aggressive and appropriate law enforcement action to prevent such offenses. The Commission will continue to monitor and analyze disaster fraud cases as they are sentenced under the new guideline amendment and will provide policy recommendations, if appropriate, in the future.