

# A RESTITUTION ALTERNATIVE FOR DEPARTMENT OF DEFENSE AGENCIES TO COMBAT PROGRAM FRAUD CIVIL REMEDIES ACT-LEVEL CASES UNDER FAR 9.4

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## ABSTRACT

In 1986, the US Congress, faced with mounting concerns about fraud committed in connection with procurements of executive branch agencies, enacted the Program Fraud Civil Remedies Act of 1986 (PFCRA). Part II of this Article outlines the PFCRA procedures for the DoD, using the US Army as an example, and Part III highlights the PFCRA's shortfalls and challenges to enforcement through its current mechanism. Part IV examines proposed reforms, legislative and otherwise, noting the probability of their ineffectiveness to fully address the underutilization of the PFCRA. Part V recommends the use of Federal Acquisition Regulation (FAR) Subpart 9.4's existing restitution provision to resolve PFCRA-level cases, pointing to the World Bank's suspension and debarment restitution program as a benchmark for what is possible. Part VI makes the case for using the authority of the DoD suspension and debarment officers to make present responsibility determinations as the starting point to address the PFCRA's underutilization by applying the restitution provision under FAR 9.4.

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## I. INTRODUCTION

In 1986, the U.S. Congress, faced with mounting concerns about fraud committed in connection with procurements of executive branch agencies, enacted the Program Fraud Civil Remedies Act of 1986 (PFCRA or the Act).<sup>1</sup> The PFCRA was enacted to address the fact that many small-dollar frauds<sup>2</sup> were not being pursued at the criminal or civil level by the Department of Justice (DoJ) or local U.S. Attorneys.<sup>3</sup> At the time, a study found that approximately sixty percent of fraud cases referred to the DoJ for prosecution were declined because of small prospective recovery.<sup>4</sup>

The PFCRA is an administrative complement to the civil False Claims Act (FCA)<sup>5</sup> that authorizes federal agencies to adjudicate small-dollar frauds that are not economical for the DoJ to litigate in federal district courts.<sup>6</sup> PFCRA actions are limited to fraudulent claims of \$150,000 or less.<sup>7</sup> The Act authorizes a presiding official (PO),<sup>8</sup> usually an administrative law judge (ALJ), to impose an assessment recovery of double damages and substantial penalties of \$5,500 per false claim or false statement.<sup>9</sup>

Immediately after the PFCRA's passage in 1986, federal agencies began devising plans for implementing the law.<sup>10</sup> Between 1987 and 1992, there was a small flurry of PFCRA activity, particularly by the U.S. Postal Service (USPS).<sup>11</sup> However, the Department of Defense (DoD) was slow to initiate PFCRA activities, and the Army pursued only one settlement under the Act during this period.<sup>12</sup> After twenty-eight years, there is a noticeable lack of evidence that the PFCRA's intended purpose, to prosecute fraud below the \$150,000 threshold, is being realized. Even though the level of fraud in government contracting continues to escalate, only a handful of cases have been successfully prosecuted within the DoD under the Act.<sup>13</sup> Thus, one may conclude that the PFCRA is inadequate in adjudicating small-dollar fraud to the point of recovery of funds for the government.

Several agencies, including the DoD and its military departments, were critical of the PFCRA's confusing procedures, which in their view contributed to the cost of pursuing the remedy, thus outweighing prospective monetary collection in many instances.<sup>14</sup> Other factors that may have contributed to the DoD's limited use of the PFCRA include a shortage of investigative resources, the time and expense involved in securing an ALJ, the requirement that adjudicated recoveries be deposited in the U.S. Treasury, and the enormous procedural hurdles and high levels of review prescribed by the Act.<sup>15</sup> Additionally, agencies may have declined to invoke the PFCRA because other more cost-effective measures, such as contractual adjustments and debarment actions, were deemed sufficient or more expedient in resolving minor fraud cases.<sup>16</sup> In short, PFCRA-level<sup>17</sup> cases are generally not pursued in the DoD due to the complex application of PFCRA procedures, which in turn prevents DoD programs from benefiting directly from fraud recoveries in civil fraud cases and investigations.<sup>18</sup>

Part II of this Article outlines the PFCRA procedures for the DoD, using the U.S. Army as an example, and Part III highlights the PFCRA's shortfalls and challenges to enforcement through its current mechanism. Part IV examines proposed reforms, legislative and otherwise, noting the probability of their ineffectiveness to fully address the underutilization of the PFCRA. Part V recommends the use of Federal Acquisition Regulation (FAR) Subpart 9.4's existing restitution provision to resolve PFCRA-level cases, pointing to the World Bank's suspension and debarment restitution program as a benchmark for what is possible. Part VI makes the case for using the authority of the DoD suspension and debarment officers (SDOs) to make present responsibility<sup>19</sup> determinations as the starting point to address the PFCRA's underutilization by applying the restitution provision under FAR 9.4. This new approach requires no new policy or changes in either the PFCRA law or the FAR for its implementation. It requires only a change in the way the DoD agency SDOs apply the restitution provision in FAR 9.4.

## II. BACKGROUND

During the American Revolution, General George Washington proclaimed that unethical contractors were "murderers of our cause [who] ought to be hunted down as pests of society and the greatest enemies to the happiness of America."<sup>20</sup> PFCRA evolved out of concern for contractors' unethical conduct, which has plagued federal contracting since the Revolutionary War era.<sup>21</sup>

Over the last three decades, many of the jobs and services traditionally performed by government employees came to be provided by private contractors, exposing the government to more fraud.<sup>22</sup> For example, large contractors now sort mail, compute taxes, prepare social security check payments, tabulate for the U.S. census, manage space flights, and monitor air traffic.<sup>23</sup>

Meanwhile, executive branch agencies have reduced their investigative resources for procurement fraud to target other investigative priorities.<sup>24</sup> As a result of the reduction in federal workers in the 1980s and 1990s, the federal workforce is now the equivalent of its size in 1963.<sup>25</sup> However, during this workforce reduction, the federal budget and procurement spending increased dramatically.<sup>26</sup> Accordingly, federal employees are unable to manage the burgeoning number of contracts due to outsourcing, which has contributed to increased incidents of procurement fraud.<sup>27</sup>

Among executive branch agencies, the DoD has been affected to the largest extent by the trend of outsourcing the performance of services previously carried out by government employees to a contractor workforce.<sup>28</sup> In 2007, the Gansler Commission<sup>29</sup> found that during the reduction in U.S. military strength following the end of the Cold War, there were drastic cuts in the military internal logistics capabilities needed for contractor oversight.<sup>30</sup>

In light of the reduced resources to address procurement fraud, there is little wonder that the PFCRA has been underutilized as a fraud-fighting tool, especially within the DoD and its military departments.<sup>31</sup> Some may think that the need for continued focus on procurement fraud is rapidly dissipating due to the end of the Iraq war<sup>32</sup> and the ending of war in Afghanistan.<sup>33</sup> However, the U.S. government's reliance on contractors, in an era of persistent conflict, is likely to rise in the future as looming budget cuts threaten to drastically reduce the size of the active military without a contemporaneous reduction in U.S. military commitments or internal logistical control.<sup>34</sup> The likelihood of unabated U.S. government procurement requirements in the near future makes it all the more critical that the intended purpose of the PFCRA—to provide executive branch agencies the ability to pursue small-dollar procurement frauds—be fully realized.<sup>35</sup>

Widespread agency criticism of the PFCRA has resulted in the underutilization of this legislation for its intended purpose.<sup>36</sup> That said, a few agencies such as the USPS, the Department of Housing and Urban Development (FIUD), and the Department of Health and Human Services (FIHS), among others, utilize the Act on some scale.<sup>37</sup> However, after some initial activity, the DoD has pursued only a limited number of PFCRA cases, and there are no records of DoD PFCRA cases being initiated since 2006.<sup>38</sup>

#### A. PFCRA Standards

Generally, the PFCRA is available to executive branch agencies when the DoJ fails to prosecute, either criminally or civilly, a matter of procurement fraud because of the low dollar threshold.<sup>39</sup> The Act covers program fraud including procurement fraud, pay and entitlement fraud, and claim fraud.<sup>40</sup> The PFCRA is available to remedy false claims, whether those claims have been paid or unpaid because the fraud was uncovered before the payment was made.<sup>41</sup> In addition, the PFCRA covers false statements and provides fraud claim monetary recoveries.<sup>42</sup> In lieu of damage awards, the PFCRA authorizes recovery of twice the amount the government has paid due to a false claim, plus up to \$5,500 per false claim or certified false statement.<sup>43</sup> When allegations of fraud involve a false claim, the claim or group of claims submitted at the same time must not exceed \$ 150,000.<sup>44</sup> The terminology "group of claims submitted at the same time" means claims arising from the same transaction submitted simultaneously.<sup>45</sup>

The \$150,000 limit applies only to the false portion of the claim and not the entire claim.<sup>46</sup> For example, if a contractor makes \$1 million in claims, but only \$100,000 is alleged to be fraudulent, the PFCRA may be applied to the entire \$1 million in claims, and the agency is not limited to characterizing only the \$100,000 as fraudulent.<sup>47</sup> However, under PFCRA procedures, any monetary recovery would be calculated based on the \$100,000 and not the

\$1 million.<sup>48</sup> Additionally, each alleged false claim is subject to a civil penalty of up to \$5,500 regardless of whether the goods or services were actually delivered or paid for.<sup>49</sup>

For both false claims and statements, no proof of specific intent to defraud is required to establish liability.<sup>50</sup> The scienter necessary to sustain liability for false statements under the PFCRA is whether defendants knew or had reason to know<sup>51</sup> their statements were false, which includes knowingly making a false claim or statement, making a false claim or statement with reckless disregard of the truth or falsity of it, or making a false claim or statement in deliberate ignorance of the truth or falsity of the claim or statement.<sup>52</sup> Only false statements accompanied by an express certification or affirmation of the truthfulness of the statement are subject to penalties.<sup>53</sup> The standard for establishing a claim or false statement is preponderance of the evidence.<sup>54</sup>

#### B. Key PFCRA Players

The PFCRA identifies at least five key players with important roles in moving a PFCRA case towards settlement or an administrative hearing: an investigating official (IO), a reviewing official (RO), a PO, an authority head (AH), and the Assistant Attorney General of the Civil Division of the DoJ.<sup>55</sup> Each agency was ordered to identify the personnel responsible as IO, RO, and AH in its implementing materials.<sup>56</sup> Figure 1, on page 477, illustrates the PFCRA process.<sup>57</sup>

#### C. Department of Defense PFCRA Structure

The PFCRA is implemented within the DoD under Directive 5505.5.<sup>58</sup> Individual agencies also have implementing regulations, designating which offices and individual positions have been identified as participants in the PFCRA process.<sup>59</sup>

An examination of the PFCRA's implementation within the DoD, by using the Army as an example, demonstrates the obstacles to its effective application.<sup>60</sup> See page 477. According to DoD Directive 5505.5, the PFCRA IO for the Department of the Army is the Assistant Inspector General for Investigations.<sup>61</sup> The IO is responsible for investigating possible cases of fraud actionable under the statute.<sup>62</sup> An investigation may commence as a regular audit or criminal investigation, or by referral from an agency-fraud counsel.<sup>63</sup> The IO is also vested with the power to subpoena documents and reports as well as to task the DoD investigators with duties.<sup>64</sup> If the IO makes a determination that prosecution under the Act is warranted, it then submits a report to the RO for consideration.<sup>65</sup> The RO is responsible for making a determination that there is adequate evidence of a defendant's liability under the PFCRA and for commencing action.<sup>66</sup> Upon determining that the adequate evidence standard is met, the RO is required to send written notice of the intent to issue a PFCRA complaint to the Assistant Attorney General of the DoJ's Civil Division seeking approval.<sup>67</sup>

If the Assistant Attorney General approves of the issuance of a PFCRA complaint, the DoJ will issue a short written statement to the RO, which authorizes the RO to issue a complaint to the defendant detailing all allegations of liability, maximum penalties and assessments that may be awarded, as well as guidance on how to file an answer and request a hearing.<sup>68</sup> The possibility of a settlement negotiation does not prevent the agency from immediately serving the defendant with the complaint.<sup>69</sup> The defendant must file an answer within thirty days of receipt of the complaint unless a thirty-day extension for good cause is granted.<sup>70</sup>

Upon receipt of the defendant's answer by the RO, both the answer and the complaint are to be forwarded to the PO.<sup>71</sup> If the defendant fails to file an answer, the defendant will have defaulted, and the PO will issue a finding of liability for the maximum amount of penalty and assessment.<sup>72</sup> The defendant can request a hearing before the PO by requesting that the PO procure the presence and testimony of any individual and relevant document.<sup>73</sup>

#### 1. The Hearing

The PFCRA requires that the PO at the hearing be an ALJ.<sup>74</sup> An ALJ can be hired by the DoD or "borrowed" from another executive branch agency as needed.<sup>75</sup> The ALJ schedules the hearing and notifies the defendant.<sup>76</sup> The ALJ is also charged with conducting a fair and impartial hearing, maintaining order, and ensuring that a record of the proceedings is maintained.<sup>77</sup> The ALJ determines the admissibility of evidence but is not bound by the Federal Rules of Evidence.<sup>78</sup>

The hearing in a PFCRA case must commence no more than six years after the date on which the allegedly false

claims or statements were made.<sup>79</sup> The agency must prove the defendant's liability and any aggravating factors by a preponderance of the evidence.<sup>80</sup> The defendant must also prove any affirmative defenses, as well as any mitigating factors, by a preponderance of the evidence.<sup>81</sup>

In making a determination on the amount of penalty or assessment, the ALJ should consider any of the presented mitigating and aggravating factors.<sup>82</sup> At the conclusion of the hearing, the ALJ is required to issue an initial decision that includes "findings of fact, conclusions of law, and the amount of any penalties and assessments imposed."<sup>83</sup> If there is no motion for reconsideration or appeal, the ALJ's decision is "final and binding on the parties 30 days after it is issued."<sup>84</sup>

## 2. Reconsideration and Appeal

Within twenty days of receipt of the initial ALJ decision, a party may file a motion for reconsideration describing any claimed errors in the initial decision.<sup>85</sup> The ALJ may either deny the motion or issue a revised initial decision.<sup>86</sup> The decision becomes final and binding thirty days after the denial or revision, unless the initial decision is appealed in a timely manner to the AH or a designee, and in the case of the Army, to the General Counsel of the Army.<sup>87</sup>

A defendant may appeal a finding of liability within thirty days of either the initial decision, the denial of motion for reconsideration, or the issuance of a revised final decision.<sup>88</sup> The appeal must specify all exceptions to the ALJ's initial decision.<sup>89</sup> No party has the right to appear before the AH, and the AH is not authorized to consider any objection that was not raised or any evidence that was not presented at the initial hearing, unless the offering party can demonstrate extraordinary circumstances.<sup>90</sup>

"The [AH] may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by" the ALJ in an initial decision, after which the AH will serve each party with a copy of the decision and a description of how to seek judicial review.<sup>91</sup> Sixty days after the AH serves the decision on the parties, that decision becomes final unless a party files a petition for judicial review in a U.S. district court with jurisdiction over the matter or in the U.S. District Court for the District of Columbia.<sup>92</sup> Any penalty or assessment imposed shall be deposited as miscellaneous receipts in the U.S. Treasury.<sup>93</sup> However, the accountability for money obtained as a result of a settlement or compromise is unclear.<sup>94</sup> If, after a finding of liability or a settlement agreement, payment has not been made by the defendant, the Attorney General is authorized to commence a civil action to collect the penalties and assessments.<sup>95</sup>

## III. THE PFCRA-AN UNDERUTILIZED TOOL

Between 1987 and 1992, Army officials were very interested in using the PFCRA as a viable tool to combat fraud, waste, and abuse in the Army procurement system.<sup>96</sup> During that period, the DoD promulgated Directive 5505.5 pertaining to the application of the PFCRA.<sup>97</sup> Several executive branch agencies, including the USPS, were quick to employ the Act to fight procurement fraud.<sup>98</sup>

According to a 1991 General Accounting Office (GAO)<sup>99</sup> report on agency use of the PFCRA, the USPS investigated forty-eight PFCRA cases, all of which were submitted to the USPS RO.<sup>100</sup> Twenty-six of these cases were sent to the DoJ for approval, with twenty-five ultimately winning approval.<sup>101</sup> By 1991, ten of the twenty-five cases were resolved, for a total of \$204,700 in penalties, assessments, and settlements.<sup>102</sup> In contrast, the DoD investigated 105 PFCRA cases, with merely fifteen cases referred to the RO and only three DoJ approvals granted.<sup>103</sup> As of 1991, only one of those cases had been resolved, with a \$15,139 settlement.<sup>104</sup>

The Army was slow to embrace the PFCRA, with only a few cases referred to the Army for PFCRA action in the late 1980s to early 1990s.<sup>105</sup> These referrals were primarily low-recovery pay and entitlement cases, which were largely returned to the original source installations with commands for prosecution under the Debt Collection Act.<sup>106</sup> Since the PFCRA's inception in 1986, the Army has used it on only two occasions, in 1991 and 2002, to address contractor fraud.<sup>107</sup> Despite its lack of robust use, the Army considered the Act to be applicable to procurement and claim fraud.<sup>108</sup>

The GAO report found that PFCRA officials from several agencies identified a number of reasons for the limited use of the PFCRA at that time.<sup>109</sup> These reasons included (1) the cost of preparing a case, which could be greater

than the potential recovery; (2) cumbersome procedural requirements; and (3) insufficient incentives for agencies to act because the PFCRA required that recoveries be paid over to the U.S. Treasury.<sup>110</sup>

Although the PFCRA was underutilized during this period, a number of supporters argued for its increased use. The DoD encouraged its subordinate military departments and agencies to use the PFCRA by stressing the potential for settlement after referral, as experienced by the USPS, which had forty-eight referrals but only ten that reached the hearing stage, due to early settlements.<sup>111</sup> The Army's more limited experience was similar. In both of its cases, the allegations of false claims were settled prior to a hearing for relatively low dollar amounts of \$15,000 and \$12,000, respectively.<sup>112</sup>

Despite the DoJ's urging, the DoD defense procurement fraud officials did not increase the use of PFCRA.<sup>113</sup> In 1991, DoD PFCRA officials discussed the 1991 GAO PFCRA report and concluded that the Act was not likely to be implemented in the DoD as the law was written.<sup>114</sup> The DoD procurement fraud officials also agreed that it was unlikely that the Act would be improved in the near future or that Congress would provide agencies with greater incentives to spend their limited financial resources and personnel to prosecute PFCRA cases.<sup>115</sup>

Notwithstanding the DoD procurement fraud officials' general lack of enthusiasm for the use of PFCRA procedures, others in the government procurement community continued to support its use. The DoD established a hotline as "a confidential avenue for individuals to report allegations of wrongdoing" within DoD programs.<sup>116</sup> Additionally, a U.S. Army Criminal Investigative Command publication called *The Detective*<sup>117</sup> began touting the possibilities of the PFCRA.<sup>118</sup>

During this same period, a number of cases were referred to the Army Procurement Fraud Branch (PFB) for possible prosecution.<sup>119</sup> However, almost all of those cases were returned for a variety of reasons, including that the alleged false claims or statement occurred before the PFCRA became law, that there was insufficient evidence, and that the cost of litigation surpassed possible recovery.<sup>120</sup> Many of the referrals also involved cases for small amounts of alleged procurement fraud below \$5,500 that could be better pursued under the Debt Collection Act.<sup>121</sup> On other occasions, Army PFCRA cases were declined because the defendant company was in poor financial health, making recovery unlikely, or there was no demonstrable financial loss because the claims had not been paid.<sup>122</sup> In 1992, the Army PFB declined all eleven PFCRA referrals it received from the DoD Inspector General (DoD-IG) for the various reasons referenced above.<sup>123</sup>

Because the PFCRA was enacted to provide an administrative process for executive branch agencies to combat small-dollar types of fraud, the failure to use the Act should be a cause for concern throughout the DoD procurement fraud community. After all, the PFCRA's underutilization has lasted approximately twenty-eight years.<sup>124</sup> In 2011, the Commission on Wartime Contracting estimated that between \$30 billion and \$60 billion were lost to fraud, waste, and abuse in the Iraq and Afghanistan wars between 2001 and 2011.<sup>125</sup> This level of fraud has caused a resurgence in the debate on federal procurement reform, which should include a consideration of capturing recovery for small-dollar fraud.

The statute's utility has been addressed in a limited number of reviews and journal articles.<sup>126</sup> In the majority of instances, commentators concluded that, in theory, the PFCRA offers a useful remedy for small-dollar fraud, but it is fundamentally flawed due to procedural complexities and the express requirement for penalties and assessments to be deposited with the U.S. Treasury's miscellaneous receipt fund.<sup>127</sup>

The DoJ and U.S. Attorney's offices do not act on many cases of fraud committed against the U.S. government for civil or criminal actions because the alleged fraud is insufficiently large and recovery likely would be limited.<sup>128</sup> Unless an investigation quickly rises to the level of a DoJ action, if unscrupulous contractors are not suspended or debarred, they may be able to continue to receive new contract work for extended periods of time while their cases laboriously make their way forward through the federal courts under the DoJ's stewardship.<sup>129</sup> With limited incentive for DoD agencies to use the PFCRA to pursue procurement fraud cases below the radar of the DoJ's civil fraud prosecutions, the Act's underutilization has caused the DoD's use of the statute to virtually lapse into obscurity.<sup>130</sup>

The DoD Procurement Fraud Working Group (PFWG) was formed to examine ways to maximize the return of



contracting funds to purchasing activities, which also included breathing new life into the PFCRA in an effort to reinvigorate the DoD's subordinate agencies' utilization of the statute.<sup>131</sup> In late 2008, a PFWG steering committee established a subcommittee for the purpose of recommending courses of action to implement the PFCRA within the DoD and the National Aeronautics and Space Administration (NASA).<sup>132</sup> The Subcommittee, consisting of the Army, Air Force, Navy, NASA, and DoJ representatives, was charged with overcoming obstacles to the regular use of the PFCRA.<sup>133</sup>

The Subcommittee concluded that the primary impediment to the PFCRA's regular use was the requirement that all recoveries were to be deposited in the U.S. Treasury.<sup>134</sup> This requirement effectively bars executive branch agencies from reimbursement of litigation and investigative costs associated with PFCRA enforcement, or from the return of recovered funds to programs that suffered losses through the fraudulent activities that are the subject of the PFCRA action.<sup>135</sup> The Subcommittee noted that the unavailability of ALJs and the costs associated with detailing ALJs from other executive branch agencies formed other impediments to the DoD's utilization of the PFCRA.<sup>136</sup>

#### IV. PFCRA REFORM PROPOSALS

Several PFCRA reform proposals have been suggested over the years in an effort to encourage federal agencies to use the statute more extensively.

##### A. PFCRA Reform Proposals

###### 1. Inspectors General Community

The Inspectors General (IG) community<sup>137</sup> recommended significant legislative PFCRA reform.<sup>138</sup> The IG's proposal included increasing the Act's jurisdictional limit from \$150,000 to \$500,000, increasing the civil penalty limit from \$5,500 to \$15,000, and allowing agencies to retain PFCRA recoveries to the extent needed to make the agencies whole.<sup>139</sup> Structurally, the proposal recommended allowing Offices of Inspector General to conduct PFCRA litigation, permitting greater delegation within the DoJ to authorize PFCRA claims, allowing agencies greater flexibility in selecting POs, clarifying the meaning of "benefit" under the Act, issuing regulations implementing these reforms, and allowing substitutes for the ALJ.<sup>140</sup>

###### 2. The DoD PFWG

The DoD PFWG Subcommittee determined that while the statute contains complex procedures, requiring the cooperation of multiple agencies to bring a case to the point of initial decision, it was workable if all parties were willing to cooperate.<sup>141</sup> As each fraud case is fact-specific, this cooperation would necessarily vary at times based on each party's determination of the sufficiency of the evidence in establishing a PFCRA case.<sup>142</sup>

The DoD PFWG Subcommittee recommended that agency fraud counsel, investigators, agency IG, and the DoJ Civil Division coordinate early and informally to evaluate the strength of the available evidence in PFCRA cases.<sup>143</sup> This approach would allow for an early consensus to be reached on the viability of a PFCRA case, thereby significantly reducing the cost, complexity, and time necessary to initiate a PFCRA complaint.

The Subcommittee's conclusions echoed the recommendations made in a September 1990 practice note in the Army Lawyer.<sup>144</sup> The practice note stressed the need to determine which potential penalties and recoveries are available should a contractor be found liable by the ALJ following the hearing on the merits of the case.<sup>145</sup> Both of these evaluations would be important parts of the initial coordination between the parties participating in PFCRA cases.

The PFWG Subcommittee considered it more feasible to take a more restrained approach to legislative reform than the IG due to the limited use of the statute to date.<sup>146</sup> For example, the PFWG Subcommittee believed that the IG's recommendation of substituting other qualified persons for ALJs, regardless of their qualifications, would not resolve the cost issues of having judges detailed from other executive agencies outside of the DoD and NASA for PFCRA cases.<sup>147</sup> Instead, the PFWG Subcommittee recommended a modification to PFCRA that would allow executive branch agencies to use civil penalties to account for litigation costs and the costs of detailing ALJs from other agencies.<sup>148</sup> Such a modification would eliminate the need to accommodate POs other than the judges originally envisioned under the statute.<sup>149</sup> The PFWG Subcommittee also believed that the substitution of persons

other than ALJs as POs would most likely result in problems sustaining PFCRA decisions on appeal in federal district courts.<sup>150</sup>

Regarding the \$150,000-per-claim recovery limit, the DoJ Civil Division, which participated in the PFWG, indicated that while this cap was relatively low, current practice when evaluating cases for LILIS and IIUD was to include multiple claims within one single PFCRA action.<sup>151</sup> Depending on the facts of the case, the approach to aggregate claims under one PFCRA action could result in a potential recovery of well above \$150,000.<sup>152</sup>

The PFWG Subcommittee concluded that the primary goal of legislative reform should be eliminating the requirement for deposit of PFCRA penalties and recoveries into the U.S. Treasury's miscellaneous receipts fund, not the wholesale reform of the entire PFCRA statute.<sup>153</sup> The Subcommittee determined that, should additional changes to PFCRA procedures be required in the future, those changes could be made based on future agency experience with PFCRA cases instead of the limited number of existing case experiences.<sup>154</sup> Once sufficient data were gathered about the Act's effectiveness in its current form, legislative changes to adjust procedures and the dollar-value limits on claims and civil penalties could be properly developed and supported.

### 3. Council of the Inspectors General on Integrity and Efficiency

In November 2012, the Council of the Inspectors General on Integrity and Efficiency (CIGIE) began to explore increased use of the PFCRA based on GAO's 2012 report on the observation and implementation of the Act.<sup>155</sup> The GAO found that the agencies under review that did not use the PFCRA, as cited in the 1991 GAO report,<sup>156</sup> tended to use other available alternatives to the PFCRA that agency officials found more useful to resolve false claims and related fraud cases.<sup>157</sup> CIGIE is currently seeking to enhance the existing legislative proposal by suggesting a cost recapture provision on existing HHS PFCRA cases.<sup>158</sup> Additional proposals included increasing the claim threshold to \$500,000 and utilizing the Armed Services Board of Contract Appeals (ASBCA) judges or the Military Judiciary in DoD instead of ALJs to preside over PFCRA cases.<sup>159</sup>

#### B. Inadequacies of PFCRA Ref onus

Despite the good intentions, the proposed reforms are likely to fall short of providing real incentives for executive branch agencies to significantly increase their use of the PFCRA. Arguably, the proposal to eliminate the requirement to deposit penalty recoveries and assessments to the miscellaneous receipts of the U.S. Treasury is the most promising, as it would potentially give executive branch agencies the ability to benefit from recoveries gained through PFCRA action. The USPS, FIUD, and HHS have an exception to the requirement to deposit miscellaneous receipts to the U.S. Treasury, which allows the return of funds directly to those agencies.<sup>160</sup> This proposed change would also need to include authorization allowing executive branch agencies to retain an amount of the civil penalties assessed in the final decision sufficient to cover the costs of pursuing PFCRA actions, including those costs associated with the ALJ and the investigation into the underlying fraud.<sup>161</sup> Agencies are still not likely to use the PFCRA even if the miscellaneous receipt requirements are eliminated because the recovery is not likely to offset all costs associated with PFCRA actions. Furthermore, the return of recovered funds to defrauded programs is of paramount importance to DoD military departments, but this concern is not likely to be redressed under CIGIE's current proposed changes to the PFCRA. In addition, any new legislation should allow executive branch agencies to return recovered funds to programs that have suffered losses due to the actions of the contractor. This change would significantly improve the PFCRA's usefulness by eliminating the fiscal impediments to its regular use by executive branch agencies.

Another challenge to the proposed changes to the PFCRA is the dollar-value limits on claims and civil penalties.<sup>162</sup> As the federal government's procurement has rapidly increased in recent years due to the explosion of service contracts, especially in the DoD, the level of fraud has increased concomitantly.<sup>163</sup> As such, the relatively low \$150,000 PFCRA claim limit may be insufficient to incentivize executive branch agencies to aggressively pursue PFCRA cases. To date, only a limited number of cases have been the subject of PFCRA actions, of which only three have been DoD prosecutions.<sup>164</sup> With isolated exceptions, these cases have settled prior to actual litigation before a PO.<sup>165</sup>

The Army and the Air Force, recognizing that the PFCRA is not a suitable tool for meeting fraud recovery



objectives, are currently focusing on fraud-related contractual remedies as a means of measuring the effectiveness of their fraud programs.<sup>166</sup> In the Army, fraud-related recoveries are tracked by the PFB through the Criminal Investigative Command (CID) Major Procurement Fraud Unit and the DoJ Financial Litigation Unit (FLU) to the Defense Finance and Accounting Services (DFAS).<sup>167</sup> Once either a settlement is reached between the DoJ and the contractor or a judgment is imposed, the Army PFB ensures that payment of funds, especially those remaining available for obligation, are tracked through the FLU back to DFAS and the purchasing activity for use.<sup>168</sup>

The Air Force has also developed a process to maximize the recapture of DoJ settlement and judgment payments to their purchasing activities.<sup>169</sup> Additionally, the Air Force emphasizes coordination of remedies in its procurement integrity program with a view toward contractual remedy when appropriate, in order to maximize the return of procurement dollars to programs before expiration.<sup>170</sup>

## V. FAR SUBPART 9.4 RESTITUTION AS AN ALTERNATIVE TO THE PFCRA

FAR Subpart 9.406-1(a)(5) already allows executive branch agencies' SDOs to consider restitution<sup>171</sup> in determining whether debarment is in the government's interest.<sup>172</sup> To address PFCRA-level cases not currently pursued by the DoD, DoD SDOs could employ FAR 9.4's restitution provision more effectively in exercising their determination of present responsibility, to facilitate the recovery of monies under PFCRA-level cases.

### A. FAR Subpart 9.4 Background and Overview

FAR Subpart 9.4 establishes which parties can be suspended or debarred<sup>173</sup> and lays out the causes for suspension and debarment.<sup>174</sup> It provides the scope,<sup>175</sup> term,<sup>176</sup> process and procedures,<sup>177</sup> and effects of suspension and debarment.<sup>178</sup> FAR 9.4 also includes the General Services Administration's (GSA's) System for Award Management (SAM),<sup>179</sup> the lead agency process and the Interagency Suspension and Debarment Committee (ISDC),<sup>180</sup> the policy reasons for suspension and debarment to protect the government's interests,<sup>181</sup> as well as mitigating factors.<sup>182</sup> In addition, FAR 9.4 states that SDOs are charged with broad discretion in determining present responsibility in furtherance of protecting the government's interest.<sup>183</sup>

### B. Restitution Policy

FAR 9.4 remedies, as currently executed, likely fall short of the PFCRA remedies because there is no damage award or restitution authority explicitly provided under FAR 9.4 administrative suspension and debarment procedures. Nevertheless, FAR 9.406-1(a)(5) specifies that, in determining whether a contractor is presently responsible, the SDO should consider "[w]hether the contractor . . . has made or agreed to make full restitution."<sup>184</sup> This language provides a means by which restitution may be considered by executive branch agencies under SDO administrative actions.<sup>185</sup>

#### 1. FAR Subpart 9.4 Restitution Provision

An examination of the FAR 9.4 restitution language demonstrates how PFCRA-level cases would fit within this provision. FAR Subpart 9.406-1(a)(5) provides:

It is the debarring official's responsibility to determine whether debarment is in the Government's interest. . . . Before arriving at any debarment decision, the debarring official should consider factors such as . . . (5) [w]hether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.<sup>186</sup>

Arguably, the restitution contemplated in FAR 9.406-1(a)(5) is an "equitable remedy under which a person is restored to his or her original position prior to loss or injury."<sup>187</sup> This restitution definition encompasses "administrative liability for improper activity" in FAR 9.406-1(a)(5) and includes refunds or "amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed."<sup>188</sup> This equitable remedy of restitution serves as a reasonable alternative approach for addressing PFCRA-level cases. Restitution of this type would provide the agencies with the opportunity to retain payments made without those monies being deposited in the U.S. Treasury.<sup>189</sup> This proposed restitution could take several forms, including monetary, credit, and in-kind restitutions. Applying this type of FAR 9.4 restitution alternative to

PFCRA-level cases would address agency concerns that the PFCRA's cumbersome procedures inhibit the return of potential fraud-related recoveries to agencies' procurement programs at the earliest possible time. However, within the DoD, there is little evidence that restitution is being used in this manner to determine present responsibility. In considering a more robust application of the FAR Subpart 9.4 restitution alternative, it is instructive to consider restitution as employed under other procurement regimes, such as the World Bank's. Although there is a marked difference in the purposes of the World Bank's sanction-based system and the FAR 9.4 suspension and debarment policies, the World Bank's restitution program can serve as a model for a FAR 9.4 restitution alternative. While the PFCRA has largely fallen into disuse by federal agencies as a means of addressing "small-dollar" fraud, the World Bank is showing success in combating fraud in its procurement programs by using restitution in its suspension and debarment program as an effective feature of its fraudfighting tool kit.<sup>190</sup>

## 2. The World Bank Restitution Program

Diversion of funds through corruption from development projects severely impairs the ability of governments and the World Bank to achieve the goals of reducing poverty, attracting investment, and encouraging good governance.<sup>191</sup> To combat contractor misconduct, including fraud, corruption, coercion, collusion, or obstruction in connection with World Bank-financed projects, the Bank exercises administrative sanctions.<sup>192</sup>

The World Bank employs a two-tier administrative sanctions process to tackle fraud and corruption in its procurement system.<sup>193</sup> Allegations that a contractor is engaged in sanctionable misconduct are investigated by the World Bank's Integrity Vice-Presidency (INT).<sup>194</sup> If the INT determines there is sufficient evidence to substantiate the allegations, the matter is then referred to the evaluation and suspension officer (EO).<sup>195</sup> Similar to the SDO responsibility with regard to suspension under FAR 9.4, the Bank's EO determines whether the contractor will be temporarily suspended from eligibility for new World Bank-financed contracts pending the final outcome of the sanctions process.<sup>196</sup>

The Bank now also takes restitution into account under section 9.03 of the Bank's Sanctions Procedures in determining present responsibility.<sup>197</sup> The institution of the Bank's restitution program as part of its two-tiered sanctions process has resulted in a positive monetary recovery outcome for the Bank's procurement program.<sup>198</sup> The Bank's exclusion of corrupt actors from bank financing protects the Bank financially and reduces fiduciary risk by serving as a disincentive to contractors by exacting a cost for the misconduct through debarment, the cost of meeting conditions for release or nondebarment, or exceptional restitution or other remedies.<sup>199</sup> The use of administrative sanctions increases the cost to contractors who would seek to benefit from fraud.<sup>200</sup> Likewise, the DoD and its military departments should consider the World Bank's program an example of what is achievable within the U.S. federal government procurement system by using the restitution under FAR Subpart 9.4.

## VI. A ROBUST FAR SUBPART 9.4 RESTITUTION APPLICATION

Despite the apparent benefits of restitution in the World Bank's sanctioning regime, the World Bank's restitution system cannot be imported wholesale to the U.S. suspension and debarment system. The World Bank's punitive orientation, including the use of administrative sanctions,<sup>201</sup> has no correlation in the FAR Subpart 9.4 system, which is not punitive but rather intended as a tool to protect the interests of the public and the federal government.<sup>202</sup> The proposed FAR Subpart 9.4 restitution approach is needed as an alternative remedy to the PFCRA for small-dollar fraud cases.

This proposed approach encourages the DoD to use the existing, nonpunitive restitution provision featured in FAR 9.4 and the authority of the DoD SDOs to make present responsibility determinations to resolve PFCRA-level cases and maximize fraud-related recoveries to its military departments. Under this proposed new approach, federal contractors would be encouraged to pay restitution under FAR 9.4 to resolve PFCRA-level cases to demonstrate present responsibility. The DoD SDO would serve as the focal point for the coordination of remedies in protecting the government's interests.<sup>203</sup> Using the Army as an example, the new approach to applying the FAR Subpart 9.4 restitution provision to resolve PFCRA-level cases could be implemented as follows.

### A. FAR Subpart 9.4 Restitution-The Army Example

The vast majority of referrals for present responsibility determinations are made to the Army SDO through the

fraud counsel by investigators or contracting programs, or by contractors under the mandatory disclosure rule.<sup>204</sup> PFCRA-level cases seeking restitution would also be referred to the Army SDO in the same manner.<sup>205</sup> Most cases would likely originate with the CID, Major Procurement Fraud Unit (MPFU), which is mandated to investigate procurement fraud in Army contracting.<sup>206</sup>

As a general rule, a Contracting Officer (CO) does not have the authority to resolve matters involving fraud-related activities.<sup>207</sup> On the other hand, the CO may accept payments the GAO has defined as refunds to the agency's appropriations to include "refunds of advances, collections for overpayments made, adjustments for previous amounts disbursed, or recoveries of erroneous disbursements from appropriation or find accounts that are directly related to, and reductions of, previously recorded payments from the accounts."<sup>208</sup>

In PFCRA-level cases identified as good candidates for restitution, that is, where there is a false statement or claim resulting in payment to a contractor of up to \$150,000, the SDO may issue show cause or request for information<sup>209</sup> notices to contractors highlighting the issue of present responsibility and the availability of the restitution remedy in the contracting channel. For PFCRA-level cases where the Army has expended funds by making payments to contractors, the SDO would discharge her duties in the manner she normally would in non-PFCRA-level referrals-make a determination of present responsibility after the contractor has been given the opportunity to respond to the notice and to address the possibility of making restitution through the contracting channel.<sup>210</sup> Now, part of the discussion between the contractor and the SDO would include restitution. For example, if the Army contractor had been unjustly enriched due to payments made in error, overpayments, or adjustments for previous amounts disbursed on the government contract in question, then it would become the contractor's burden to make a proffer for restitution to the CO, which would work in the contractor's favor when the SDO made a present responsibility determination. The restitution would be evidence that the contractor was redressing the possible breakdown of its business integrity and prospectively making changes to prevent its reoccurrence. Accordingly, the SDO would favorably consider the restitution as a mitigating factor.<sup>211</sup>

The SDO would rely on the CO's determination regarding the adequacy of the contractor's restitution proffer of repayment. The CO could accept restitution payment by generating a contract modification for that purpose.<sup>212</sup> In those cases where the contractor misconduct was minor and not otherwise subjected to a DoJ action, the CO would also provide the appropriate release to the contractor after restitution was made.<sup>213</sup> For a CO to accept the restitution proffer, and for the Army to retain the money, the restitution must qualify as an exception to the Miscellaneous Receipts Act as either a payment made in error, an overpayment, or an adjustment for previous amounts disbursed.<sup>214</sup>

The SDO may also consider holding the administrative decision in abeyance to create space for negotiations between the Army CO and the contractor to reach an acceptable resolution on the final restitution amount. In instances where the SDO deems a contractor who has proceeded through this process as substantially on the way to being "presently responsible" but would like to ensure continued present responsibility, the SDO may choose to enter into an administrative agreement, whereby the terms and conditions provide adequate assurance that the governmental interests will be sufficiently protected to preclude the necessity of debarring or suspending the contractor.<sup>215</sup> The SDO may then consider incorporating the restitution payment as part of the contractor's responsibility to successfully conclude the administrative agreement.<sup>216</sup>

In administrative agreements, the contractor could agree to restitution, in the same manner that contractors agree to employee training, separation of certain employees from management or programs, implementation or extension of ethics programs, external audits, access to corporate records, as well as other remedial measures.<sup>217</sup> If a contractor under an administrative agreement fails to make the agreed-upon restitution payments, its failure to do so would become an independent basis for suspension or debarment.<sup>218</sup>

To make this restitution provision effective, DoD military departments would need to identify cases fitting within the PFCRA-level definition as early as possible in the investigative process in order to highlight the payment of restitution as one of the possible mitigating factors against FAR 9.4 suspension and debarment. These cases would be processed in the same manner as other cases before the SDO, with the SDO playing a pivotal role in the

coordination of remedies to ensure that restitution would be a part of the present responsibility determination.<sup>219</sup> The process of early identification would also meet the requirement of DoD Directive 7050.05 for coordination of fraud remedies at the inception of cases.<sup>220</sup> Additionally, through early coordination, the SDO would avoid any potential conflict with the DoJ regarding fraud investigations so as not to jeopardize pending or potential DoJ criminal or civil actions.

Given the limited use of the PFCRA within the DoD, the military departments would be the prime beneficiaries for the resolution of PFCRA-level cases under a robust FAR Subpart 9.4 restitution application. Consequently, when applying this new approach to PFCRA-level cases, the SDOs would need to be cognizant of the appearance of coercion in instances where restitution would be warranted under FAR Subpart 9.4. Because the SDO would now be making restitution a part of the discussion, the contractor would have the opportunity to address whether or not restitution was made through the contracting channel.<sup>221</sup> Because the SDO would not be involved in determining the adequacy of the restitution, the SDO would be insulated from any coercive action or the appearance of coercion. In implementing this new approach, the DoD, through industry outreach and training, should make known the possibility of the resolution of PFCRA-level cases under the restitution provision of FAR Subpart 9.4. This new approach would be bolstered by the FAR's mandatory ethics program, which includes mandatory disclosure of the contractor's misconduct under FAR Subpart 3.10.<sup>222</sup> The promulgation of these mandatory rules, made effective on November 12, 2008,<sup>223</sup> has begun to influence corporate ethical culture.<sup>224</sup> These mandatory disclosure rules require government contractors to establish internal control systems to provide timely recognition of instances of breach of codes of conduct, to ensure corrective action in these instances, and to provide periodic review and assessment of the contractor's ethics system.<sup>225</sup> Government contractors are also required to self-report on fraudulent or criminal behavior, which has been a point of contention and dispute for contractors.<sup>226</sup> Similarly, the disclosure rule would encourage contractors to bring PFCRA-level cases, which are below the \$150,000 threshold, to the attention of DoD SDOs as part of a mandatory disclosure.<sup>227</sup> As an additional benefit, the reach of mandatory disclosure would be extended as DoD military departments adopted a more robust use of FAR Subpart 9.4 restitution. Commercial item and small business contractors, who are not currently covered under the mandatory disclosure rules, likely would be more forthcoming regarding fraud-related information when restitution is part of a present responsibility discussion.<sup>228</sup>

This approach does not require new legislation or changes to suspension or debarment policy across all federal agencies. Instead, only a more vigorous application of FAR Subpart 9.4 restitution is required by DoD military departments, by using show cause and request for information notices, outreach, and education to both industry and government, to generate awareness and highlight this new restitution alternative.

There is not a more opportune time to expand the use of FAR Subpart 9.4 restitution than the present, when Congress has been showing renewed interest in FAR 9.4 suspension and debarment because of the significant magnitude of federal spending on government contracts, as well as recent reports that executive branch agencies continue to award contracts to contractors who previously engaged in misconduct.<sup>229</sup> Until Congress is willing to remove this disincentive and provide agencies with greater leeway to dedicate resources to fight procurement fraud, a more creative use of FAR Subpart 9.4 restitution is promising as a means of accomplishing the PFCRA's intended objective of adequately addressing small-dollar fraud. The challenges of incorporating a more vigorous restitution process to FAR Subpart 9.4 administrative procedures are minimal because restitution is already contemplated in FAR 9.4 and its implementation would promote integrity in federal procurement.

#### B. Benefits of FAR Subpart 9.4 Restitution

There are additional benefits to adopting the FAR Subpart 9.4 restitution approach. This new approach is consistent with federal restitution policy, lessens the hurdles for fraud-related contractual recoveries to agencies, and may motivate other agencies to ramp up their suspension and debarment programs. First, this restitution approach is consistent with the restitution policy within federal courts, where under the U.S. Sentencing Guidelines, a court may direct, by way of a restitution order, that a defendant makes a single or lump-sum payment, or partial payment at specified intervals, or in-kind payments, or a combination of payments at specified

intervals.<sup>230</sup> An in-kind payment "may be in the form of (A) return of property; (B) re- placement of property; or (C) if the victim agrees, services rendered to the victim or to a person or organization other than the victim."<sup>231</sup> As shown by the early experience of the World Bank, a robust application of restitution at the SDO's discretion could appropriately incentivize contractors and the government alike to strengthen the government procurement system by stemming the tide for fraud, waste, and abuse in small-dollar fraud cases that otherwise fall through the cracks in PFCRA procedures.<sup>232</sup>

Second, this approach under FAR Subpart 9.4 presents a better resolution to the use of the PFCRA within the DoD than its current status because it lessens the hurdles for recoveries from contractors whose actions may harm the government.<sup>233</sup> Due to the challenges faced by the PFCRA process within the DoD, these types of PFCRA-level cases tend to be pursued as fact-based debarments for present responsibility.<sup>234</sup> While this effort is commendable, it generally does not provide the agency with recoveries to activities or programs, which are potential victims of contractor fraud.<sup>235</sup>

Third, while some agencies have been lukewarm in their pursuit of suspension and debarment against nonresponsible contractors,<sup>236</sup> the prospect of a more robust FAR Subpart 9.4 restitution application may serve to motivate other agencies outside of the DoD to ramp up their suspension and debarment programs because of the possibility of returning fraud-related re- coveries to the agencies' contracting programs and activities.<sup>237</sup> Contractors would become more keenly aware that facing an SDO without adequate emphasis on an ethical corporate culture is not likely to win a favorable outcome of present responsibility. Contractors with substantial government business interests that are facing the possibility of suspension and debarment, with potentially far-reaching negative impacts, may be more willing to make restitution to avoid or decrease the probability of this impact, which is sometimes described as the "corporate death sentence."<sup>238</sup>

Although there are serious ramifications for any contractor subjected to suspension and debarment, these FAR 9.4 administrative actions are not meant to be punitive.<sup>239</sup> Under the FAR 9.4 administrative procedures, the proposed restitution would not serve to punish but instead to be used as a tool to make the government whole.<sup>240</sup> In total, this would provide a strong incentive to contractors to improve, maintain, or adopt solid ethical and compliance programs within their organizations.

Given the evolution and historical context of FAR Subpart 9.4, this proposal, which expands its reach and includes a robust exercise of its restitution language, plugs the leak of small-dollar fraud cases that are causing a depletion of the DoD's procurement dollars. This proposal also falls squarely in line with FAR 9.4's policy to balance the equities between the government's interests and protection of the contractor from arbitrary and capricious agency actions. Heretofore, restitution under FAR 9.4 has not been seriously contemplated as an administrative tool for making the government whole under the suspension and debarment regime.<sup>241</sup> Providing a contractor who may have benefited from fraud an opportunity to make restitution as an element of present responsibility is consistent with federal restitution policy.<sup>242</sup>

Fourth, agencies will typically benefit from the restitution. Obligated procurement funds are for a specified period of time.<sup>243</sup> After the period of availability, the funds become expired.<sup>244</sup> Upon expiration, the funds are available to adjust existing obligations or to liquidate prior valid obligations, but they are not available to incur new obligations.<sup>245</sup> After five years, the funds remaining are canceled and unavailable for any purpose.<sup>246</sup> With the limitation that recoveries are unavailable to the agency after their expiration, the use of the restitution measures that already exist in the U.S. suspension and debarment system under FAR 9.4 present one possible alternative approach to address this problem of returning procurement funds that were subjected to program fraud to purchasing activities.<sup>247</sup>

#### C. Possible Opposition to FAR Subpart 9.4 Restitution

Although there are significant benefits to using the FAR Subpart 9.4 restitution provision in this robust manner, there are legitimate concerns regarding how the provision would be exercised in practice. One potential downside to a more robust use of FAR 9.4 restitution for PFCRA cases is the potential friction with the DoJ's prosecution of FCA cases. Contractors may try to preempt an FCA filing by the DoJ by first approaching an agency and making



restitution.<sup>248</sup>

However, there is no real danger of an earlier restitution payment precluding an FCA filing by the government because neither the CO receiving the restitution nor the SDO determining present responsibility has authority to settle or preclude an FCA case.<sup>249</sup> In addition, any conflicts that may develop between agency pursuit of PFCRA-level cases involving restitution and DoJ FCA jurisdiction could be addressed under the umbrella of the ISDC by resolving jurisdictional concerns between the DoD SDOs and IGs, and the DoJ.<sup>250</sup>

A second potential shortcoming is that some contractors may risk not reporting small-dollar fraud under the mandatory disclosure program to avoid paying restitution in circumstances where restitution would have been warranted under FAR Subpart 9.4. But it is more plausible that the vast majority of contractors would readily opt for self-reporting under the mandatory disclosure rule in accordance with their corporate ethics program, especially if self-reporting could be resolved through restitution, instead of risking a delay in reporting that could lead to lengthy FCA litigation, treble damages, and possible suspension and debarment.<sup>251</sup> A contractor who attempted to circumvent the disclosure rule to avoid making restitution would also undermine its ability to argue for leniency under criminal, civil, or administrative remedies later exercised by the government.<sup>252</sup> Finally, contractors would be free to assume the business risk associated with failing to make restitution if they deemed it to be unwarranted.<sup>253</sup>

#### D. What Would Be Left of the PFCRA ?

The proposed robust use of the FAR Subpart 9.4 restitution provision to resolve PFCRA-level cases addresses the PFCRA's underutilization by the DoD and its military departments on multiple levels. First, the restitution provision avoids using the ALJ in instances when the contractor agrees to restitution as part of a present responsibility determination.<sup>254</sup> Second, the restitution approach eliminates recoveries going directly to the U.S. Treasury's Miscellaneous Receipts account, as currently provided for in the PFCRA, and instead allows repayments to contracting activities in which the availability of funding remains open or unexpired. Third, the proposed FAR Subpart 9.4 restitution provision is much simpler, less costly, and more straightforward in approach as compared to the current PFCRA process. Through this restitution provision, DoD military departments would be able to address and recoup monies for small-dollar fraud cases to a greater extent than the current practice under the Act.

While the proposed FAR Subpart 9.4 restitution would fill a procedural gap for the DoD under the PFCRA for small-dollar fraud cases, it does not, on its own, cover the full reach of the PFCRA, which includes recoveries for false statements and cases that may not involve restitution.<sup>255</sup> Other federal agencies such as FIUD, HHS, and USPS, which have had success in utilizing the PFCRA, would be able to continue to employ its procedures.<sup>256</sup> In addition, the application of the FAR Subpart 9.4 restitution would not preclude an agency from seeking authorization from the DoJ to file a PFCRA complaint if a present responsibility determination did not result in restitution.

#### VIL CONCLUSION

Employing the DoD SDOs' authority for determining present responsibility, the restitution provision under FAR Subpart 9.4 represents a possible solution for the PFCRA's underutilization within the DoD and its military departments,<sup>257</sup> to recoup funds lost due to small-dollar fraud in cases where the government has made payment to the contractor. Although there have been recommendations from the procurement fraud community to modify the PFCRA to increase its use by allowing for the reimbursement of litigation costs to the agencies, or by substituting the use of ALJs especially within the DoD, none represents a straightforward method to address PFCRA underutilization short of significant legislative changes to the Act. This proposed avenue of resolution has escaped serious consideration to date.

The use of restitution is consistent with the U.S. Sentencing Guidelines, from which the FAR compliance program was originally derived, and restitution has been successfully deployed as a means of combating fraud in the World Bank procurement integrity system. This approach would also bypass many of the impediments to the PFCRA's use, but at the same time address the small-dollar fraud-related conduct envisioned by the Act that has long plagued the federal procurement system. It would also serve to maximize the opportunity for executive branch

agencies, especially the DoD, to benefit from fraud-related recoveries.

#### Footnote

1. Program Fraud Civil Remedies Act of 1986 (PFCRA), Pub. L. No. 99-509, 100 Stat. 1934 (codified at 31 U.S.C. §§3801-3812). An earlier article by Michael Davidson, Combating SmallDollar Fraud Through a Reinvigorated Program Fraud Civil Remedies Act, 37 Pub. Cont. L.J. 213, 214 (2008), suggested ways the executive branch agencies could improve the use of the PFCRA. This Article provides another way forward encompassing present responsibility based on 72 C.F.R. §65,873, which took effect on December 24, 2007, for the first time requiring federal contractors to implement many of the U.S. Sentencing Commission's (USSC's) guidelines. See 31 U.S.C. §§3551-3556 (2000); regulatory changes to FAR 9.4.
2. U.S. Gen. Accounting Office, GAO/AFMD-91 -73, Program Fraud: Implementation of the Program Fraud Civil Remedies Act of 1986, at 2 (1991) [hereinafter GAO/AFMD91-73] (small-dollar fraud cases are those cases that the Department of Justice (DoJ) "declines to pursue under other statutes" prohibiting false claims and statements; small-dollar fraud is a synonym for PFCRA cases with a ceiling of \$150,000). Small-dollar fraud as used in this Article, unless otherwise defined, refers to monetary amounts that fall within the PFCRA threshold of \$150,000.
3. See PFCRA §6104(a); see also Procurement Fraud Division, Office of the Judge Advocate Gen., Procurement Fraud Notes, Army Law., Sept. 1990, at 57, 58 [hereinafter Procurement Fraud Notes]; Davidson, supra note 1, at 219.
4. U.S. Gen. Accounting Office, Fraud in Government Programs: -How Extensive Is It? -How Can It Be Controlled? ii (1981) [hereinafter Fraud in Government Programs].
5. The False Claims Act (FCA) is codified at 31 U.S.C. §§3729-3733 (also called the Lincoln Law); see also *ACLU v. Holder*, 673 F.3d 245, 246-47 (4th Cir. 2011).  
From 1860 to 1863, the federal budget grew dramatically due to spending associated with the Civil War. Sadly, some unscrupulous people viewed the growing federal budget as a font to be plundered. Congress held hearings and learned that federal treasure has been spent on decrepit horses and mules, weapons that would not fire, rancid rations, and phantom supplies. In response, in 1863, Congress enacted the False Claims Act ("FCA"). When enacted, the Department of Justice did not exist, and federal law enforcement fell to Attorney General Edward Bates and his staff in Washington, D.C., as well as to the then-independent U.S. Attorneys in each federal judicial district. In enacting the FCA, Congress included qui tam provisions authorizing private citizens (known as qui tam relators), to use the FCA to file suit on behalf of the United States and to share in any recovery from the fraudsters. *Id.*
6. See 31 U.S.C. §§3801-3812. The Department of Defense (DoD) Directive 7050.05 requires DoD entities to coordinate fraud remedies from the time a case is first opened. See 32 C.F.R. §516; see also Dep't of Def., Instruction No. 7050.05, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities 1 (2008) [hereinafter DoD Dir. 7050.05].
7. 31 U.S.C. §3803(c)(1).

#### Footnote

8. 5 U.S.C. §§3105, 3344.
9. 31 U.S.C. §3802(a)(1)-(2); 28 C.F.R. §85.3 (raising the civil penalty limit from the amount in the statute (\$5,000) to \$5,500, in accordance with the inflation adjustment procedures prescribed in section 5 of the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, effective on or after September 29, 1999).
10. See GAO/AFMD-91 -73, supra note 2, at 4; see also Final Rule on PFCRA Implementation, 53 Fed. Reg. 11656 (Apr. 8, 1988); U.S. Dep't of Def., Dir. No. 5505.5, Implementation of the Program Fraud Civil Remedies Act 1 (1988) [hereinafter DoD Dir. 5505.5], reprinted in U.S. Dep't Army Reg. 27-40, Litigation ^ 8-1 (Sept. 19, 1994) [hereinafter AR 27-40] (explaining the DoD's agency-specific implementation PFCRA plan).
11. GAO/AFMD-91-73, supra note 2, at 4.
12. *Id.*

13. U.S. Gov't Accountability Office, GAO-12-275R, Program Fraud Civil Remedies Act: Observations on Implementation 24 (2012) [hereinafter GAO-12-275R].

14. Id. at 23.

15. Id. at 20.

16. Id. at 24-25.

17. The term "PFCRA-level," as used in this Article, means instances where potentially actionable PFCRA claims for \$150,000 or less have been made by a contractor, and the government has paid on the claim. Id.

#### Footnote

18. See 31 U.S.C. §3806(g)(1) (explaining that civil fraud recoveries under the Fraud Claims Act and the PFCRA are returned to the U.S. Treasury Miscellaneous Receipts account and not to the agency as the victim).

19. Present responsibility is an inquiry that focuses on the perceived ability of a contractor to contract with the government in a responsible manner on a going-forward basis. See Kate M. Manuel, Cong. Research Serv., R40633, Responsibility Determination Under the Federal Acquisition Regulation: Legal Standards and Procedures 4-5 (2013). The suspension and debarment officer (SDO) asks: Despite the contractor's prior misconduct or impropriety, is the contractor presently responsible? Can the contractor be trusted to perform in accordance with contract requirements, governing law, and overall, to conduct itself ethically? Id. at 5.

20. Michael J. Davidson, 10 U.S.C. §2408: An Unused Weapon in the Procurement Fraud Wars, 26 Pub. Cont. L.J. 181, 181 (1997).

21. See id.

22. See Allison Stanger, One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy 12 (2009).

23. Id.

#### Footnote

24. See Nick Schwellenbach, Fraud Cases Fell While Pentagon Contracts Surged, Ctr. for Pub. Integrity (Apr. 1, 2009, 12:30 PM), <http://www.publicintegrity.org/2009/04/01/2906/fraudcases-fell-while-pentagon-contracts-surged>.

25. Stanger, *supra* note 22, at 17 ("[T]he size of the executive branch federal workforce in 2008 was the same as it was in 1963. The federal government had 1.9 million civilian employees (including temporary workers but not the Post Office) in 1963, and the same number in 2006.").

26. Id. ("[T]he federal budget in 1963 was roughly \$111.3 billion, versus \$2.7 trillion in 2006. Adjusting for inflation, the differential is still staggering: \$733.3 billion in 1963 versus \$2.7 trillion in 2006. That enormous gap is filled by contractors.").

27. See id.

28. See Comm'n on Army Acquisition & Program Mgmt. in Expeditionary Operations, Urgent Reform Required: Army Expeditionary Contracting 4, 21 (2007) [hereinafter Comm'n on Army Acquisition].

29. The Commission on Army Acquisition and Program Management in Expeditionary Operations became known as the Gansler Commission after its chair, Jacques S. Gansler, former Under Secretary of Defense for Acquisition, Technology and Logistics. It was established by the Secretary of the Army in 2007 as an independent body to investigate the contingency contracting crisis. See id. at 1.

30. See id. at 3<sup>4</sup>.

31. GAO/AFMD-91-73, *supra* note 2, at 10; GAO-12-275R, *supra* note 13, at 26.

32. Tim Arango & Michael S. Schmidt, Last Convoy of American Troops Leaves Iraq, Marking a War's End, N.Y. Times, Dec. 19, 2011, at A6.

33. Mark Landler & Helene Cooper, Obama Will Speed Pullout from Afghanistan, N.Y. Times, June 23, 2011, at A1; see also Anthony H. Cordesman, Ctr. for Strategic & Int'l Studies, Transition in the Afghanistan-Pakistan War: How Does This War End iii (2012) ("This 'transition' is already underway, but no one can yet predict how the withdrawal of US and other NATO/ISAE combat forces from Afghanistan in 2014 will play out over time.").

## Footnote

34. Comm'n on Arai Acquisition, *supra* note 28, at 29.

35. See H.R. Rep. No. 99-1012, at 257-58 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.C.A.N. 3868, 3902-04. The legislative history of the PFCRA indicates that it was intended to address "small-dollar cases" of fraud against the government because, in such cases, "the cost of litigation often exceeds the amount recovered," thus making it economically impractical for the DoJ to go to court. *Id.* at 3903.

36. GAO/AFMD-91-73, *supra* note 2, at 10; GAO-12-275R, *supra* note 13, at 23-24.

37. See GAO-12-275R, *supra* note 13, at 20 (noting that 141 cases were referred to the DoJ between 2006 and 2010, with ninety-six percent of these being referrals from the Department of Housing and Urban Development (HUD); during FY 2006-2010, approximately \$5.4 million was collected by HUD under the PFCRA).

38. See *id.*

39. See 31 U.S.C. §3803(c)(1); see also GAO-12-275R, *supra* note 13, at 1. The DoJ remains committed to litigating procurement fraud cases and has a policy directing the parallel proceedings for criminal, civil, and administrative remedies. See *Crim. Drv., U.S. Dep't of Justice, Combating Procurement Fraud: A National Initiative to Increase Prevention and Prosecution of Fraud in the Federal Procurement Process* 1, 3-4 (2006) ("At this critical time when our national defense, homeland security, and other government resources are most precious, criminals who cheat the government must be identified, stopped and punished."); see also Memorandum from U.S. Att'y Gen. on Coordination of Parallel Criminal, Civil, and Administrative Proceedings (July 28, 1997) (on file with the Dep't of Justice) (setting forth policy that DoJ attorneys should actively coordinate their cases with agencies to ensure that all appropriate remedies are implemented in white-collar fraud cases).

40. 32 C.F.R. §516.68(b). The DoD defines "procurement fraud" to include offenses involving contractor misconduct. U.S. Dep't of Def., Instruction No. 5505.02, *Criminal Investigations of Fraud Offenses* f E2.1.2. (2013) (noting that the DoD defines fraud broadly to include just about any crime involving a contract); see also AR 27-40, *supra* note 10, ¶ 8-1.

41. See 31 U.S.C. §3803(c)(2)(B); AR 27-40, *supra* note 10, ¶ 8-1.

42. 29 C.E.R. §22.3(a)®.

## Footnote

43. 29 C.F.R. §22.3(a)(iv).

44. *Id.*, DoD Dir. 5505.5, *supra* note 10, at E2.6.1.2. The Attorney General or an Assistant Attorney General designated by the Attorney General approves the issuance of a complaint in a written statement described in 31 U.S.C. §3803(c)(1).

45. DoD Dir. 5505.5, *supra* note 10, at E2.6.2.

46. *Id.* at E2.6.1.2.

47. *Orfanos v. Dep't of Health & Human Servs.*, 896 E. Supp. 23, 28 (D.D.C. 1995).

48. DoD Dir. 5505.5, *supra* note 10, at E2.6.1.2.

49. (*Afanos*, 896 E. Supp. at 27. For example, for a defendant alleged to have submitted seven false claims, totaling \$120,000, all of which were paid, the maximum total of penalties and assessments would be \$278,500 ( $[\$120,000 \times 2] + (\$5,500 \times 7)$ ). If the claims were not paid, the maximum penalties would be \$38,500 ( $\$5,500 \times 7$ ).

50. See *id.* at 26.

51. See 29 C.F.R. §22.3(b)(1); see also DoD Dir. 5505.5, *supra* note 10, at E2.2.13 (uniform policies and procedures for DoD agencies to use the PFCRA may be found at 32 C.F.R. pt. 277).

52. 29 C.F.R. §22.3(b)(1).

53. DoD Dir. 5505.5, *supra* note 10, at E2.3.2.1.2.

54. *Id.* at E2.2.16 ("[E]vidence necessary to support a presiding officer's decision that a violation of the PFCRA (reference (a)) has occurred [is] [e]vidence that leads to the belief that what is sought to be proved is more likely true than not true.").

## Footnote

55. 29 C.F.R. §22.

56. DoD Dir. 5505.5, *supra* note 10, at 4.1, 4.3.1.

57. GAO-12-275R, *supra* note 13, at 14.

58. DoD Dir. 5505.5, *supra* note 10, at E2.1.3.

59. See generally U.S. Dep't of Air Force, Instr. 51-1101, ¶ 5.1.1 (2003) [hereinafter AFI 51-1101]; AR 27-40, *supra* note 10, at Glossar<sup>1</sup>. The Army's definition of procurement fraud is similar to the DoD's but more focused:

Any intentional deception of DOD (including attempts and conspiracies to effect such deception) for the purpose of inducing DOD action or reliance on that deception. Such practices include, but are not limited to, the following: bid-rigging; making or submitting false statements; submission of false claims; use of false weights or measures; submission of false testing certificates; adulterating or substituting materials; or conspiring to use any of these devices.

*Id.*

60. GAO-12-275R, *supra* note 13, at 14.

61. DoD Dir. 5505.5, *supra* note 10, at E2.2.3.

62. 29 C.F.R. §22.4; DoD Dir. 5505.5, *supra* note 10, at E2.2.12.

63. AR 27-40, *supra* note 10, ¶ 8-3(a)(2).

64. 29 C.F.R. §22.23; see also 31 U.S.C. §3804(a).

65. 29 C.F.R. §22.5.

#### Footnote

66. 29 C.F.R. §22.34; DoD Dir. 5505.5, *supra* note 10, at E2.5.1. "Adequate evidence" means that there is sufficient information to support a reasonable belief that the alleged conduct occurred. *Id.* at E2.2.1. In making the assessment, fraud counsel may be required to assist the RO in making the decision and drafting the appropriate documents reflecting that decision. See AR 27-40, *supra* note 10, ¶ 8-12g.

67. 29 C.F.R. §22.11-12. According to the 1988 DoD Directive, this notice should be brief, outlining only the major issues in the case. See DoD Dir. 5505.5, *supra* note 10, at E2.5.

68. 29 C.F.R. §22.7; DoD Dir. 5505.5, *supra* note 10, at E2.5.1. Some executive branch agencies have used this time period between the DoJ approval and serving a complaint to send the defendant a demand letter with the hopes of spurring settlement. 29 C.F.R. §§22.44, 22.46; see also 31 U.S.C. §3716 (stating that the RO has the authority to settle or compromise any PFCRA case after the authorization from the DoJ and before an initial decision by the ALJ; after the initial decision is issued, the authority head (API) has the authority to settle or compromise, unless an appellate or Debt Collection Act action is pending in federal court; only the Attorney General has authority to compromise or settle if an action is pending in federal court).

69. See DoD Dir. 5505.5, *supra* note 10, at E2.6, E2.6.3; see also 31 U.S.C. §3803(b)(1)(A)(B).

70. 29 C.F.R. §22.9; DoD Dir. 5505.5, *supra* note 10, at E2.9 (stating that the defendant's answer should admit or deny each allegation of liability and list any defenses upon which the defendant intends to rely, as well as describe any mitigating factors that should reduce the penalties or assessments).

71. 29 C.F.R. §22.11.

72. 29 C.F.R. §22.10.

73. 29 C.F.R. §22.23.

74. 5 U.S.C. §§3105, 3344; see also 29 C.F.R. §18; DoD Dir. 5505.5, *supra* note 10, at E2.2.17 (noting that a PO is normally a federal employee).

#### Footnote

75. 5 U.S.C. §§3105, 3344 (stating that, absent other statutory authority, an agency would have to hire or borrow an ALJ under the authority of the Economy Act); see also 5 U.S.C. §1535(a)-(b) (commenting that this would require the hiring agency to pay for the actual costs of the ALJ).

76. See 5 U.S.C. §3105 (noting that ALJs must conduct procedures in accordance with 5 U.S.C. §§556-557).

77. *Id.*



78. See 29 C.F.R. §22.34; see also DoD Dir. 5505.5, *supra* note 10, at E2.34 (noting that the ALJ may exclude evidence where its probative value is substantially outweighed by the dangers of unfair prejudice, confusion, delay, or repetition); *id.* at E2.30.1 ("The presiding officer shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment. . . and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.").

79. 29 C.F.R. §22.27.

80. 29 C.F.R. §22.30.

81. *Id.*

82. 29 C.F.R. §22.31; DoD Dir. 5505.5, *supra* note 10, at E2.31.

83. 29 C.F.R. §22.36; DoD Dir. 5505.5, *supra* note 10, at E2.37 (stating that the decision is served on the parties within ninety days after the conclusion of the hearing and submission by the parties of any post-hearing briefs to the ALJ).

84. 29 C.F.R. §22.37; DoD Dir. 5505.5, *supra* note 10, at E2.38.7.

85. 29 C.F.R. §22.38; DoD Dir. 5505.5, *supra* note 10, at E2.38.

86. 29 C.F.R. §22.38.

#### **Footnote**

87. 29 C.F.R. §22.39; DoD Dir. 5505.5, *supra* note 10, at E2.2.3 (noting that, for the DoD, the AH is the Deputy Secretary of the Department, or an official or employee of the DoD or the military departments designated in writing by the Deputy Secretary of Defense).

88. 29 C.F.R. §22.39.

89. 29 C.F.R. §22.39(d).

90. 29 C.F.R. §22.17; DoD Dir. 5505.5, *supra* note 10, at F2.39.8, F2.39.9.

91. DoD Dir. 5505.5, *supra* note 10, at F2.39.10.; 29 C.F.R. §22.42.

92. 29 C.F.R. §22.42; see also 31 U.S.C. §3805 (stating that a party to the PFCRA case may file a petition for judicial review within sixty days of the date on which the AH distributed the decision to the appealing party, and only after the appealing party has exhausted all administrative remedies under the PFCRA).

93. 29 C.F.R. §22.43; see also 31 U.S.C. §3806(g)(1).

94. See DoD Dir. 5505.5, *supra* note 10, at E2.46.

95. 29 C.F.R. §22.43. Such an action must be brought within three years of the date on which the determination of penalties and assessments became final. 31 U.S.C. §3808(b). In this civil action, the determination of the defendant's liability and amounts of penalties and assessments shall not be subject to review. 31 U.S.C. §3806(b).

96. See Procurement Fraud Notes, *supra* note 3, at 57.

97. See generally DoD Dir. 5505.5, *supra* note 10.

#### **Footnote**

98. See GAO/AFMD-91-73, *supra* note 2, at 3.

99. Prior to July 7, 2004, the Government Accountability Office (GAO) was called the General Accounting Office. Ralph C. Nash Jr. et al., *The Government Contracts Reference Book* 263 (4th ed. 2013).

100. GAO/AFMD-91-73, *supra* note 2, at 6 tbl.3, 11.

101. *Id.* at 6 tbl.3.

102. *Id.*

103. *Id.*

104. *Id.* The one resolution was in a 1991 Army case against Prospect Fasteners, Inc. After the DoD approved a PFCRA complaint, the company agreed to settle within a week, paying the maximum amounts of penalties and assessments that could have been awarded. See Christine S. McCommas, *Army Obtains First DOD Recovery Under the Program Fraud Civil Remedies Act*, *Army Law.*, Aug. 2011, at 23, 23. To date, this is the only Army PFCRA case that has resulted in a recovery. *Id.*

105. See GAO/AFMD-91-73, *supra* note 2, at 6 tbl.3.

106. See *id.* (the Army considered the Debt Collection Act a better vehicle to resolve those cases); see also 31 U.S.C. §3716(b)(1) (procedural rules governing debt-collection procedures for administrative offset and federal income tax refund offset).

107. See Davidson, *supra* note 1, at 214 ("Unfortunately, only a handful of agencies have successfully used PFCRA as a procurement fraud-fighting tool. Most agencies, including the Department of Defense (DoD), have used PFCRA only sparingly and many agencies have failed to pursue a single PFCRA case. In short, with few exceptions, PFCRA has proved largely ineffective as a vehicle for addressing small-dollar fraud.").

108. See GAO/AFMD-91-73, *supra* note 2, at 7.

109. *Id.* at 18 app. II.

#### Footnote

110. *Id.*; see also 31 U.S.C. §3302(b) (Miscellaneous Receipts Act requires the agency to deposit the money as miscellaneous receipts in the U.S. Treasury).

111. GAO/AFMD-91-73, *supra* note 2, at 6. It is important to note that the USPS brought most of its PFCRA complaints for small employee-related frauds, and often, if the cases had gone to a hearing, the costs would have exceeded the recovery. See *id.* at 10.

112. Interview with Christine McCommas, Attorney, Former-Chief, 1997-2011, Army Procurement Fraud Branch, Dep't of the Army (May 25, 2011).

113. See GAO-12-275R, *supra* note 13, at 21.

114. See generally GAO/AFMD-91-73, *supra* note 2; GAO-12-275R, *supra* note 13, at 1. The GAO report was viewed as not well considered because it did not advance any improvements or amendments to the PFCRA statute but instead merely listed statistics and complaints. *Id.* at 1-2. Agencies realized that a PFCRA action was as burdensome as pursuing civil litigation. See *id.* at 3. The PFCRA discovery process and hearing process were viewed as being extremely cumbersome, and at the conclusion any recovered funds would be deposited in the U.S. Treasury. *Id.* Agencies generally do not have the time, financial resources, or sufficient staffing levels to litigate PFCRA claims. *Id.* at 26. These issues drove agency officials to largely discontinue utilizing PFCRA. *Id.* at 3.

115. See GAO-12-275R, *supra* note 13, at 23.

116. The Department of Defense Hotline, Office of Inspector Gen., U.S. Dep't of Def., <http://www.dodig.mil/hotline/> (last visited Apr. 15, 2015).

117. Christy Kern, Fighting Fraud: PFCRA Comes of Age Recouping Small Dollar Losses, DETECTIVE, Spring 1989, at IT15.

118. Interview with Russell Geoffrey, Attorney, Former Dir., Contract Integrity Ctr., Def. Contract Mgmt. Agency & Chair of the DoD Procurement Fraud Working Grp. (July 2, 2014). Barry Sax, an assistant counsel at the Defense Logistic Agency (DLA), created a detailed PFCRA handbook, and then-Major Uldric Fiore of the Army Procurement Fraud Branch produced a report called "What About PFCRA?," which included a description of what kind of case makes a good candidate for the PFCRA. *Id.*

#### Footnote

119. Procurement Fraud Notes, *supra* note 3, at 57.

120. See *id.* at 58.

121. This approach provided a greater possibility for recovery as well as a less expensive procedure than the PFCRA.

122. See generally GAO/AFMD-91-73, *supra* note 2.

123. Interview with Christine McCommas, *supra* note 112 (commenting that 1992 was the last year detailed in the Army Procurement Fraud Branch PFCRA files).

124. The Act has been "not generally used" since its enactment in 1986. GAO-12-275R, *supra* note 13, at 25.

125. See Comm'n on Wartime Contracting in Iraq & Afg., Transforming Wartime Contracting: Controlling Costs, Reducing Risks 5 (2011) [hereinafter Comm'n on Wartime Contracting].

126. See, e.g., Davidson, *supra* note 1, at 213; Procurement Fraud Notes, *supra* note 3, at 57-59.

127. See Davidson, *supra* note 1, at 213.

#### **Footnote**

128. The DoJ has exclusive statutory litigation authority over fraud cases upon indictment, and DoD policy requires "reasonable deference" to the DoJ "at least with respect to criminal investigations," even prior to indictment.

Michael Davidson, Claims Involving Fraud: Contracting Officer Limitations During Procurement Investigation, *Army Law.*, Sept. 2002, at 21-30 (detailing the Army's deference to the DoJ in procurement fraud investigations).

129. The DoJ often restricts the release of information, which is necessary to allow parallel proceedings to go forward. See *id.* at 21, 33. As a result, suspensions and debarments are often processed sequentially after the DoJ has finished its criminal and civil cases against the contractor, or has declined to prosecute. See *id.* The reasons for sequential rather than parallel proceedings can be explained by (1) DoD deference to the DoJ, (2) the grand jury system's secrecy requirements, and (3) general concern over the effect of parallel proceedings damaging chances for a successful conviction or plea bargain. *Id.* at 29, 30.

130. Ser GAO-12-275R, *supra* note 13, at 24.

131. The DoD Procurement Fraud Working Group (PF'WG) is a group of DoD procurement fraud officials working to improve best practices within the DoD government procurement community. Interview with Russell Geoffrey, *supra* note 118.

132. *Id.*

133. *Id.*

134. *Id.*; 31 U.S.C. §3806(g). The U.S. Postal Service and the Department of Health and Human Services (HHS) are exempted from depositing PFCRA recoveries into the U.S. Treasury Miscellaneous Receipts account. See 31 U.S.C. §3806(g)(2).

135. U.S. Army Legal Servs. Agency, USALASA Report, *Army Law.*, Mar. 2001, at 30, 39.

#### **Footnote**

136. 5 U.S.C. §1535(b) (requiring the hiring agency to pay for the actual costs of the ALJ).

137. In the Army, the Office of Inspector General plays an important role in investigating PFCRA claims. See *supra* notes 61-65 and accompanying text. The Inspectors General (IG) community includes IGs from the General Sendees Administration (GSA) and the Department of Homeland Security (DHS), who chair the National Procurement Fraud Task Force Legislation Committee.

138. See generally Nat'l Procurement Fraud Task Force, U.S. Dep't of Justice, Procurement Fraud: Legislative and Regulatory Reform Proposals (2008) (proposing legislative reform to improve ethics among contractors and to improve the prosecution and adjudication of procurement fraud).

139. *Id.* at 8-14.

140. *Id.*

141. Interview with Russell Geoffrey, *supra* note 118.

142. *Id.*

143. *Id.*

#### **Footnote**

144. Procurement Fraud Notes, *supra* note 3, at 58-59 (discussing the need for agency counsel to carefully evaluate the available evidence to ensure that the PFCRA was an appropriate remedy to address the alleged conduct of the contractor).

145. *Id.* at 58.

146. GAO-12-275R, *supra* note 13, at 2.

147. Interview with Russell Geoffrey, *supra* note 118.

148. *Id.*

149. *Id.*

150. *Id.*; 29 C.F.R. §22.42 (authorizing judicial review of an appropriate U.S. district court of a final decision of the AH imposing penalties or assessments under the PFCRA); see also 31 U.S.C. §3805(b)(1)(A).

151. Interview with Russell Geoffrey, *supra* note 118.

152. *Id.*

153. *Id.*

#### Footnote

154. See GAO/AFMD-91-73, *supra* note 2, at 18; Fraud in Government Programs, *supra* note 4, at 24-25.

155. GAO-12-275R, *supra* note 13, at 2. In 1991, the GAO "reported that federal agencies did not use PFCRA extensively." *Id.* at 1. Congress requested that the GAO develop more recent information on federal agencies' use of the PFCRA from 2006 to 2010. *Id.* at 2. The GAO conducted a review on (1) the extent to which federal agencies have used the PFCRA in recent years, (2) factors reported by agency officials and IGs that either facilitated or limited the use of the PFCRA, and (3) views of federal agency IGs on prior recommendations made by the National Procurement Fraud Task Force on possible PFCRA reforms. *Id.*

156. GAO/AFMD-91-73, *supra* note 2, at 11.

157. GAO-12-275R, *supra* note 13, at 3. Agencies such as HUD, which used the PFCRA, attributed their use to support of the agency top management, applying the Act to already successful DoJ criminal prosecution, proactive IG involvement, coordination between the agency and DoJ, standardized PFCRA case documentation, and a PFCRA case tracking system. *Id.*

158. Interview with Russell Geoffrey, *supra* note 118.

159. *Id.* Similar recommendations were made by the DoD PFWG and the Panel on Contracting Integrity established under section 813 of the National Defense Authorization Act (NDAA) F'Y 2007. See Office of the Under Sec'y of Dee. Acquisition, Tech., and Logistics, Dep't of Def., B-89F0B27, Panel on Contracting Integrity 2010 Report to Congress 36 (2011). The 2007 NDAA established the Panel under the Under Secretary of Defense for Acquisition, Technology and Logistics (AT&T) to examine ways to improve the DoD procurement system. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §813, 120 Stat. 2083, 2320 (2006).

#### Footnote

160. 31 U.S.C. §3806(g)(2)(AHE).

161. See 5 U.S.C. §§3105, 3344.

162. See DoD Dir. 5505.5, *supra* note 10, at E2.6.1.2.

163. See generally Comm'n ON Wartime CONTRACTING, *supra* note 125; USASpending.gov, <http://www.usaspending.gov/inclex.php> (last visited Mar. 15, 2015) (reporting that executive branch agencies spent \$495.7 billion on procurement contracts in EY 2013).

164. GAO-12-275R, *supra* note 13, at 21.

165. *Id.* at 13.

166. See Interview with Angelines McCaffery, Att'y, Army Procurement Fraud Branch, Dep't of the Army (Jan. 20, 2014); see also Interview with Rodney Grandon, Att'y, Suspension & Debarment Official, Dep't of the Air Force (Jan. 30, 2014).

#### Footnote

167. See Interview with Angelines McCaffery, *supra* note 166; Interview with Rodney Grandon, *supra* note 166; see also Memorandum of Understanding Between the Defense Finance and Accounting Service (DFAS), the Department of the Army, the Department of Justice, and the U.S. Courts, on Collection of Army Procurement Fraud Recovered Funds (June 1, 2010) (on file with the U.S. Army Legal Services Agency) [hereinafter DFAS Memorandum of Understanding].

168. DFAS Memorandum of Understanding, *supra* note 167. However, if recovery occurs outside of the fiscal life cycle, the funds are returned to the U.S. Treasury. See 31 U.S.C. §3806(g)(1).

169. Interview with Rodney Grandon, *supra* note 166; see also Memorandum of Understanding by and Among Air Force Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), et al., at 1 (Dec. 9, 2011) [hereinafter Air Force Memorandum of Understanding].

170. See Air Force Memorandum of Understanding, *supra* note 169, at 1. An appropriation is available for

obligation for a definite period of time. See 31 U.S.C. §1502(a). An agency must obligate funds within their period of availability. See *id.* If an agency fails to obligate funds before they expire, those funds are no longer available for new obligations. See *id.* Expired funds retain their "fiscal year identity" for five years after the end of the period of availability. 31 U.S.C. §1553(a). During this time, the funds are available to adjust existing obligations, or to liquidate prior valid obligations, but not to incur new obligations. See *id.* Five years after the funds have expired, they become "cancelled" and are not available for obligation or expenditure for any purpose. 31 U.S.C. §1552; see also *In re Magnavox-Use of Contract Underrun Funds*, B-207433, 83-2 CPD T1 401, at 6 (Comp. Gen. Sept. 16, 1983); Comptroller Gen. Warren to the Sec'y of the Army, 33 Comp. Gen. 57, 60 (1953); U.S. Dep't of Def., Reg. 7000.14-R, Department of Defense Management Regulation, vol. 3, ch. 10, H 100201.B (June 2012); U.S. Dep't of Def., Reg. 7000.14-R, Department of Defense Management Regulation, vol. 14, ch. 2, 1 020103.E (Nov. 2010).

171. It is important to note that the term "restitution" as used here may mean "administrative liability for the improper activity" as outlined in FAR 9.406-1(a)(5), but it may also be considered to be untethered from the other mitigating factors listed in FAR 9.406-1(a)(5).

172. See FAR 9.402(a)-(b), 9.406-1(a).

#### Footnote

173. FAR 9.400(a)(1), 9.403.

174. FAR 9.406-2, 9.407-2.

175. FAR 9.401, 9.405, 9.406-4 to 9.406-5, 9.407-4 to 9.407-5. Generally, companies and individuals that are suspended or debarred are prevented from forming contracts or participating in nonprocurement transactions such as grants or approvals from the government for a specified period of time. See Exec. Order No. 12549, 51 Fed. Reg. 6370 (Feb. 21, 1986). Suspensions are temporary while debarments are usually between one and three years. Compare FAR 9.406, with FAR 9.407.

176. See FAR 9.406-1(b), 9.407-1(b)(1)-(2).

177. FAR 9.406-3, 9.407-3.

178. FAR 9.405.

179. FAR 9.404. The System for Award Management (SAM) is the official U.S. government system that consolidated multiple federal procurement systems, including the Excluded Parties List System (EPLS). About SAM, SAM, <https://www.sam.gov/> (last visited Mar. 15, 2015).

180. FAR 9.402(d).

181. FAR 9.402(b) (stating that "[t]he serious nature of debarment and suspension requires that [the] sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment").

182. FAR 9.406-1 (a)(1)-(10) (providing mitigating factors including, but not limited to, "[w]hether the contractor had effective standards . . . and internal control systems in place"; brought the misconduct to the attention of the government; adequately investigated the misconduct; and paid or expressed a willingness to pay civil and criminal fines, restitution, and investigation cost).

183. See FAR 9.402, 9.406-1.

184. FAR 9.406-1(a)(5) (emphasis added).

185. See *id.*

#### Footnote

186. *Id.*

187. Roger LeRoy Miller, *Fundamentals of Business Law: Excerpted Cases* 784 (3d ed. 2012); see also Catherine MacMillan, *Solle v. Butcher*, in *Landmark Cases in the Law of Restitution* 325, 326 (Charles Mitchell & Paul Mitchell eds., 2006) (essays on legal history); *Black's Law Dictionary* 1428 (9th ed. 2009).

188. *Rebates of Travel Mgmt. Ctr. Contractors*, 65 Comp. Gen. 600, 602 (1986) (citing Treasury Department-GAO Joint Regulation No. 1, reprinted as app. II to tit. 7 of GAO'S Policy and Procedures Manual for Guidance of Federal Agencies).

189. See 31 U.S.C. §3302(b) (noting that the miscellaneous receipt statute requires that absent specific authority,



federal agencies must deposit monies received for the government into the Treasury as miscellaneous receipts).

#### Footnote

190. Sec Sanctions System at the World Bank, World Bank, <http://go.worldbank.org/W1CZWZY0E0> (last visited Mar. 15, 2015). Since 1999, the World Bank sanctions have included publicly debarring more than 650 firms and individuals, temporarily suspending 239 firms, and prosecuting at least thirty firms for engaging in fraud and corruption in Bank finance projects. World Bank Office of Suspension & Debarment, Report on Functions, Data and Lessons Learned 2007-2013, at 4 (2014) [hereinafter World Bank Report].

191. in fiscal year 2010, the World Bank Group committed \$72.2 billion in loans, grants, and equity investments and guarantees, representing a twenty-three percent increase over 2009. Demand for World Bank Group Support Tops \$72 Billion as Developing Countries Face Continued Financing Gaps, World Bank (July 1, 2010), <http://go.worldbank.org/043J6N7760>. Promoting good governance and tackling corruption are critical to the World Bank's mission to achieve sustainable development and poverty reduction. The World Bank's Sanction System: Tackling Corruption Through a Two-Tier Administrative Sanctions Process, World Bank, <http://go.worldbank.org/EB6JXKU4Z0> (last visited Mar. 15, 2015) [hereinafter World Bank's Sanction System].

192. World Bank's Sanction System, *supra* note 191. Similar to the FAR, these World Bank sanctions are designed to protect the funds entrusted to the World Bank, while also offering contractors involved in alleged misconduct the opportunity to respond to the allegations and, in similar fashion to FAR 9.4, demonstrate their present responsibility. See *id.*, FAR 9.406-3(b)(l), 9.407-3(b)(l).

193. World Bank Report, *supra* note 190, at 25.

194. External Investigations, World Bank, <http://go.worldbank.org/FBADMWYODO> (last visited Mar. 15, 2015); 'Ehe mandate of the World Bank's Integrity Vice-Presidency (IN'E) is to investigate allegations of fraud and corruption in Bank Group-supported activities (external investigations), as well as allegations of significant fraud or corruption involving staff (internal investigations). World Bank's Sanction System, *supra* note 191; World Bank, Guide to the Staff Rule 8.01: Investigative Process 4 (2011).

195. World Bank, World Bank Sanctions Procedures 3, 10-11 (2011), available at [http://siteresources.worldbank.org/INTOFFEVASUS/Resources/WB\\_Sanctions\\_Procedures\\_Jan\\_2011\(with\\_July\\_2011\\_Amendments\).pdf](http://siteresources.worldbank.org/INTOFFEVASUS/Resources/WB_Sanctions_Procedures_Jan_2011(with_July_2011_Amendments).pdf) [hereinafter World Bank Sanctions PROCEDURES]. World Bank Group has four evaluation and suspension officers (EOs), including one for each of the following: (1) IBRD/IDA (World Bank), (2) International Finance Corporation (IFC), (3) Multilateral Investment Guarantee Agency (MIGA), and (4) investment projects guaranteed by the World Bank (known as partial risk guarantees or PRGs). Sanctions System at the World Bank, World Bank, <http://go.worldbank.org/W1CZWZY0E0> (last visited Mar. 15, 2015). At the first-tier level, the EO reviews the evidence submitted by the IN'E and determines whether the evidence supports a finding that the alleged misconduct occurred. World Bank Sanctions Procedures, *supra*, at 11. If the EO makes a positive determination of contractor misconduct, a notice of sanctions proceedings is issued to the contractor. *Id.* This notice includes the misconduct allegations, the evidence, and the recommended sanction. *Id.* at 11-12. The INT also refers recommendations for further investigation to other Bank units and officials, such as the World Bank's president, regional and operations vice presidents, the IEC, and the MIGA. Interview with Pascale Dubois, Suspension & Debarment Official, World Bank Sanction System, Office of Evaluation & Suspension (OES) (Jan. 18, 2014). The INT assists in preventative efforts to protect Bank Group funds, as well as those funds entrusted to the Bank Group, from misuse and to deter fraud and corruption in Bank Group operations. Frequently Asked Questions, World Bank, <http://go.worldbank.org/PIT6RY5UB0> (last visited Mar. 15, 2015). Under the World Bank's first tier, the contractor can choose not to contest the allegations or recommended sanction, in which case the recommended sanction takes effect. Sanctions System, *supra* note 190. If, on the other hand, the contractor contests the sanction action, the matter is referred to the World Bank's Sanctions Board at the second tier of the system. *Id.* The Sanctions Board is comprised of three World Bank staff and four external members. World Bank's Sanction System, *supra* note 191. For sanctions cases involving IEC, MIGA, or PRGs, there are separate internal and external Sanctions Board members with specific expertise. See Int'l Bank for Reconstruction & Dev. et al., Sanctions Board

Statute, art. V(3) (2010) [hereinafter Sanctions Board Statute]; World Bank's Sanction System, *supra* note 191. Since 1999, the World Bank has publicly sanctioned over 400 contractors. See World Bank Listing of Ineligible Firms & Individuals, World Bank, <http://www.worldbank.org/debarr> (last visited Mar. 15, 2015). In 2010, the World Bank financial commitments were IBRD lending-\$44.2 billion, IDA commitments- \$14.5 billion, IFC financings-\$12 billion, and MIGA guarantees-\$1.5 billion. *Id.*

#### Footnote

196. See World Bank Report, *supra* note 190, at 10 (sixty percent of the World Bank's cases are resolved at this point); see also EAR 9.407-1(b)(2). As in the case of the EAR, there are multiple possibilities for administrative outcomes, including public letter of reprimand, debarment, conditional non-debarment, debarment with conditional release, and restitution. World Bank, The World Bank's Anti-Corruption Guidelines and Sanctions Reform: A User's Guide 14-15 (2007), available at <http://siteresources.worldbank.org/PROJECTS/Resources/409401173795340221/RevisedPMNDEinaluserGuideline031607.pdf>. At the second tier, upon referral to the Sanctions Board, the administrative record of the evidence is reviewed and the Board may convene a hearing as part of its deliberations. See World Bank Sanctions Procedures, *supra* note 195, at art. V. The chair of the Sanctions Board is always an external member, with all members serving renewable three-year terms. *Id.* at art. VI(1). The Sanctions Board meets two to four times per year for hearings and deliberations and may convene in plenary session or as a panel. *Id.* at art. VII(2). 'The Board is supported by a secretariat of attorneys and other staff and interns. *Id.* at art. IX. 'The Board reviews appealed cases de novo based on pleadings and any hearings. See *id.* at art. VIII §8.01. If the Board finds sufficient evidence, it may impose sanctions from the range of sanctions set by Guidelines. *Id.* at art. VIII §8.01(b). Notably, the Sanctions Board is not bound by the SDO's recommendation. *Id.* 'The Sanctions Board publishes the full text of its decision, which is final and cannot be appealed. *Id.* at art. X §10.01(b); SANCTIONS Board Statute, *supra* note 195, at art. XIV.

197. World Bank Sanctions Procedures, *supra* note 195, at art. IX §9.01(b).

198. See Enforcing Accountability: Italian Company Lotti to Pay US\$350,000 in Restitution to Indonesia After Acknowledging Fraudulent Misconduct in a World Bank-Financed Project, World Bank (Dec. 22, 2010), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUS TICE/0contentMDK:22 7963 79~menuPK:2643 814~pagePK:64020865~piPK: 149114~theSite PK:445634,00.html>; Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and Their Affiliates (Feb. 22, 2012), <http://web.worldbank.org/WBSITE/ EXTERNAL/NEWS/0contentMDK:2 3123315~pagePK:642 57043 ~piPK:43 7 3 76~theSitePK: 4607,00.html>.

#### Footnote

199. Danielle Langton, Cong. Research Serv., RL32374, Anti-Corruption Standards of the International Financial Institutions 2 (2004).

200. 'The World Bank's assistance in providing governance and combating corruption is aimed at helping countries lift their people out of poverty by improving the delivery of basic services to the poor and creating growth and employment opportunities by encouraging private investment. See What We Do, World Bank, <http://www.worldbank.org/en/about/what-we-do> (last visited Mar. 15, 2015).

201. See Sanctions Board Decisions, World Bank, <http://web.worldbank.org/WBSITE/ EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOEFEVASUS/0contentMDK:2 3059612~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html> (last visited Mar. 15, 2015). While the World Bank sanctions system regarding restitution is still in the early stages, it is making progress on contractors' scrutiny as the pressure against fraud and corruption continues with the increased use of suspensions and debarments. See Langton, *supra* note 199, at 4-5 (tracing historical development of Bank's compliance programs).

202. EAR 9.402(b).

#### Footnote

203. The compliance programs contained in the FAR are modeled after the USSC's requirements, and later the Sarbanes-Oxley Act of 2002. Sarbanes-Oxley Act of 2002, Pub. L. No. 107204, 116 Stat. 745 (codified in scattered

sections of 15 U.S.C. and 18 U.S.C.). In 1991, the DoD mandated that federal government contractors establish voluntary compliance ethics programs. See John T. Boese & Beth C. McClain, *New False Claims Law Incentives Pose Risks for Contractors and States 2* (Wash. Legal Found., Critical Legal Issues Working Paper Series No. 139, 2006), available at [http://www.wlf.org/Publishing/publication\\_detail.aspPidM778](http://www.wlf.org/Publishing/publication_detail.aspPidM778). The voluntan' compliance program was later revised following the aftermath of the Enron scandal into a mandatory ethics program requiring disclosure of contractor's misconduct. U.S. Sentencing Guidelines Manual §8B2.1 (2007); Sentencing Guidelines for United States Courts, 75 Fed. Reg. 3525, 3534-35 (Jan. 21, 2010).

204. See AR 27-40, *supra* note 10, 1i 8-3.

205. See *id.* H 8-1.

206. See *id.*, see also U.S. Dep't of the Army, Army Reg. 195-2, *Criminal Investigation Activities* 1i 3-11 (June 9, 2014) [hereinafter AR 195-2].

207. See, e.g., *United States ex rel. Biddle v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 161 F.3d 533, 541-42 (9th Cir. 1998) (citing FAR 33.209 and the Navy Acquisition Procedures Supplement) (Navy Contracting Officer (CO) had a duty to detect and "refer possible fraud to the appropriate authorities"); *UMC Elec. Co. v. United States*, 45 Fed. Cl. 507, 509 (1999) (noting that "a contracting officer cannot find fraud, but must refer suspected cases of fraud to the Department of Justice for review pursuant to 41 U.S.C. §605(a) (1994)"), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001). However, the CO's ability to resolve matters in which fraud may be suspected depends on how' frilly developed the fraud-related allegation is at the point of resolution. *Green Dream Grp., ASBCA No. 57413*, 13 BCA H 35,272, at 12 (Mar. 25, 2013).

208. FEMA Disposition, B-230250, 69 Comp. Gen. 260, 262 (Feb. 16, 1990).

209. Interview with Angelines McCaffery, *supra* note 166. The show cause and request for information notices are generally used by the government to show that cause may exist for debarment but simultaneously provide the contractor the opportunity to present information to challenge the government's information or explain the circumstances to indicate the contractor is presently responsible. 31 U.S.C. §3803(a)(1)-(2).

#### Footnote

210. 31 U.S.C. §3803(h).

211. Interview with Rodney Grandon, *supra* note 166 (noting that the Air Force actively considers contractual remedies in making present responsibility determinations).

212. See FAR pt. 43 (policies and procedures for preparing and processing contract modifications); see also *Tri-O, Inc. v. United States*, 28 Fed. Cl. 463, 472 (1993) (suggesting that negotiation of a settlement and payment operates as an accord and satisfaction only as to the claims considered during the settlement process).

213. *Tri-O, Inc.*, 28 Fed. Cl. at 471 (noting that the CO would be releasing a contractual remedy and not a fraud remedy).

214. The CO can accept payment in a narrow exception to the Miscellaneous Receipts Act when appropriately characterized as a repayment to an appropriation. See *Nat'l Sei. Found.*, 13-310725, 2008 WL 2229784, at \*2 (Comp. Gen. May 20, 2008). Two types of receipts that are classified as repayments are reimbursements and refunds that are limited to "amounts collected from outside sources for commodities or services furnished, which by law may be credited directly to the appropriation." *Nat'l Aeronautics & Space Admin.-Retention of Demutualization Compensation*, 13-305402, 2006 WL 39322, at \*2 (Comp. Gen. Jan. 3, 2006); see also *Jobs Corps Ctr. Receipts*, 65 Comp. Gen. 666, 674 (1986).

#### Footnote

215. See Memorandum from Paul A. Dennet, Adm'r for Fed. Procurement Policy & Linda M. Combs, Controller, Office of Fed. Fin. Mgmt. for Heads of Dep'ts & Agencies on Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations 1 (Aug. 31, 2006), available at <http://www.vwhitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2006/m06-26.pdf> (commenting that executive agencies may use administrative agreements as alternatives to debarment).

216. See FAR 9.406-1(a)(5).

217. Alan Al. Grayson, *Suspension and Debarment* 38 (1991).

218. See FAR 9.406-1(a)(5).

219. See FAR 9.406-1.

220. See 32 C.F.R. §516.1(a)(4); see also DoD Dir. 7050.05, *supra* note 6, at 2.

221. It is important to note that the SDO is not bound to make a finding of present responsibility and refrain from taking a suspension and debarment action. However, the restitution payment is a mitigating factor against suspension or debarment action.

222. FAR 3.1003(a)(1). Amended rules in FAR Parts 2, 3, and 52 are modeled after existing requirements found in other areas of corporate compliance, such as the U.S. Sentencing Guidelines; the Department of Veterans Affairs; and the Environmental Protection Agency, which only recommended that government contractors should establish a code of ethics. See Michael Hordell et al., *Contractor Compliance Programs, Training and Internal Controls: FAR Councils' Emphasis on Integrity in Contracting*, Gov't Cont. Update (Pepper Hamilton LLP, D.C.), Jan. 2008, at 1.

223. 72 C.E.R. §65873. This rule change, which took effect on December 24, 2007, for the first time required federal contractors to implement many of the USSC's guidelines. See 31 U.S.C. §§3551-3556; see also Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064, 67064-93 (Nov. 12, 2008); Daniel I. Gordon, *In the Beginning: The Earliest Bid Protest Filed with the U.S. General Accounting Office*, 13 Pub. Procurement L. Rev. NA147, NA148 (2004). The new FAR clauses require contractors to (1) have a written code of business ethics and conduct within thirty days of contract award, which must be issued to each employee engaged in performance of the contract; (2) promote compliance with its code of business ethics and conduct; (3) if other than a small business, establish a formal training program and internal control system within ninety days of contract award; and (4) display agency or DHS fraud hotline posters in common workplace areas except where the contractor has implemented a business ethics and conduct awareness program, including a reporting mechanism. Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. at 67064-93.

224. Carl L. Vacketta & Seamus Curley, *An Effective Compliance Program: A Necessity for Government Contractors Under IDIQ Contracts and Beyond*, 37 Pub. Cont. L.J. 593, 623 (2008).

225. Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. at 67067; see also Vacketta & Curley, *supra* note 224, at 596. The new compliance regime essentially establishes a framework for disclosure and corporate ethics management but does not prescribe specific ethical requirements. Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. at 67067. Notably, commercial item contractors and small business contractors are exempted from the new ethics requirement for compliance programs. *Id.*

#### Footnote

226. See Christopher R. Yukins, *Feature Comment: U.S. Contractor Compliance Rules Are Likely to Expand*, 50 Gov't Contractor H 147, Apr. 23, 2008, at 1; see also 18 U.S.C. §3553(a)(7) (requiring the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense"). Orders of restitution are authorized under 18 U.S.C. §§2248, 2259, 2264, 2327, 3663, and 3663A. In addition, "[f]or offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation." U.S. Sentencing Guidelines Manual §8B1.1 ant. Background (2007). Some commentators have argued that the new disclosure obligation will serve as a disincentive for government contractors from rigorously investigating allegations of corruption within their corporation for fear of ensuring their own prosecution. See Yukins, *supra*, at 6. These concerns are counter to what has been previously considered as the traditional purpose of compliance ethics programs. The traditional purpose of ethics program was to encourage critical self-examination of a corporation's ethical culture. See U.S. Sentencing Guidelines Manual §8B2.1(a)(2). The new disclosure obligation is in effect a decision by the government to shift monitoring costs to the contractor community. See Yukins, *supra*, at 6.

227. Vacketta & Curley, *supra* note 224, at 598 (commenting that the mandatory disclosure regulation was having a

substantial impact on government contractors' compliance obligation and corporate ethical cultures). FAR 52.203-13(d) and 52.203-14(d), entitled Contractor Code of Business Ethics and Conduct, apply to contracts with a value of more than \$5 million and with a performance period of 120 days or greater. See FAR 52.203-13 to -14 (2010); see also FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 65873 (Nov. 23, 2007). Contracts for commercial items procured pursuant to FAR pt. 12 and contracts that will be performed entirely outside the United States, however, are exempt from the rule. *Id.*

228. See Vacketta & Curley, *supra* note 224, at 598.

229. The 112th Congress enacted and considered several bills that would expand executive agencies' authority to debar or suspend contractors. See Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, §§8035(b), 8124-25, 504-05, 514, 630-31, 433-34, 514, 125 Stat. 786, 813, 837, 883, 928, 1049-50, 1164 (2011); see also National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §818(b)(3), 125 Stat. 1298, 1494 (2011); Fairness and Transparency Act of 2011, H.R. 3184, 112th Cong. §9(b); Stop Outsourcing and Create American Jobs Act of 2011, H.R. 3338, 112th Cong. §4(b)(2); Overseas Contractor Reform Act, H.R. 3588, 112th Cong. §2(a) (2011); Restore the American Dream for the 99% Act, H.R. 3638, 112th Cong. §1309(b) (2011); Veterans Programs Improvement Act of 2011, S. 914, 112th Cong. §703; Accountability Through Electronic Verification, S. 1196, 112th Cong. §4(b)(1)(C) (2011); Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. §171(a); American Jobs Matter Act of 2011, S. 1363, 112th Cong. §2(a); Syria Sanctions Act of 2011, S. 1472, 112th Cong. §5(b)(2).

#### Footnote

230. See 18 U.S.C. §3664(f)(3)(A).

231. 18 U.S.C. §3664(f)(4).

232. See GAO/AFMD-91-73, *supra* note 2, at 10-11, app. II; Procurement Fraud Notes, *supra* note 3, at 58.

233. See GAO-12-275R, *supra* note 13, at 3.

234. Interview with Angelines McCaffery, *supra* note 166.

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235. See David Robbins, As Suspension and Debarment Grows the National Discourse, We Should Not Lose Sight of Broader Procurement Fraud Remedies, 48 PROCUREMENT Law. 1, 1 (2012).

236. See GAO-12-275R, *supra* note 13, at 2.

237. See Rebates from Travel Mgmt. Ctr. Contractors, 65 Comp. Gen. 600, 602 (1986).

238. See, e.g., Drury D. Stevenson & Nicholas J. Wagoner, FCPA Sanctions: Too Big to Debar?, 80 Fordham L. Rev. 775, 807-09 (2011); Joseph G. Billings & Nathanael D. Hartland, Off with Her Head: Suspensions and Debarments as Punishment, Serv. Contractor, Feb. 2011, at 17; Jason Miller, Push for More Suspension, Debarments Receives Mixed Reactions, Fed. News Radio (Nov. 18, 2011, 5:20 AM), <http://www.federalnewsradio.com/?nid=517&sid=2638305>.

239. See FAR 9.402 (stating that the purpose of administrative actions is to protect the government's interest and not for the purposes of punishment); see also FAR 9.404(a), 9.401, 9.405, 9.405-2.

240. FAR 9.402(b).

241. Instead, it is only one of ten mitigating factors considered in determining a contractor's present responsibility. See FAR 9.406-1(a).

#### Footnote

242. See 18 U.S.C. §3664(f)(3)(A).

243. See 31 U.S.C. §1502(a), 1552. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within an appropriation's period of availability. See *In re Magnavox-Use of Contract Underrun Funds*, B-207433, 83-2 CPD ¶ 401, at 4 (Comp. Gen. Sept. 16, 1983); Comptroller Gen. Warren to the Sec'y of the Army, 33 Comp. Gen. 57, 60-61 (1953); U.S. Dep't of Def., Reg. 7000.14-R, Department of Defense Management Regulation, vol. 3, ch. 10, 100201.B (June 2012).

244. 31 U.S.C. §1502(a), 1558(a). Upon a protest, the appropriation that would have funded the contract remains available for obligation for 100 days after a final ruling on the protest. FAR 33.102(c).



245. See 31 U.S.C. §§1553(a), 1558(a).
246. 31 U.S.C. §1552(a).
247. Interview with Pascale Dubois, *supra* note 195.
248. See FAR 9.406-1(a)(5).
249. See 31 U.S.C. §3730(a).
250. See Exec. Order No. 12549, 51 Fed. Reg. 6370, §4 (Feb. 18, 1986) (establishing the Interagency Suspension and Debarment Committee (ISDC) to monitor implementation of Executive Order 12549 and participate in a government-wide system for debarment and suspension from programs and activities involving federal financial and nonfinancial assistance and benefits); see also About the ISDC, ISDC, <http://isdc.sites.usa.gov/about-us/> (last visited Mar. 15, 2015).

#### Footnote

251. Sec 10 U.S.C. §2393; FAR 9.4.
252. See 31 U.S.C. §3729; FAR 9.406-1.
253. See FAR 9.406-1(a) (providing that "if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary").
254. See *id.* (stating that "[i]t is the debarring official's responsibility to determine whether debarment is in the Government's interest").
255. See GAO-12-275R, *supra* note 13, at 6.

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256. See GAO/AFMD-91-73, *supra* note 2, at 6.
257. It is matter of public policy that the federal government seeks to prevent public funds from being illegally siphoned by corrupt contractors. See *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) ("It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to the public purposes is remedial by definition.").

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