PROCUREMENT FRAUD REMEDIES: ACHIEVING MEANINGFUL RESTITUTION

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> *[W]aste, fraud, abuse, and mismanagement are not victimless activities. Resources are not unlimited, and when they are diverted for inappropriate, illegal, inefficient, or ineffective purposes, both taxpayers and legitimate program beneficiaries are cheated. Both the Administration and the Congress have an obligation to safeguard benefits for those that deserve them and avoid abuse of taxpayer funds by preventing such diversions.*[1]

I. Introduction

In November 2018, a major defense contractor agreed to reimburse the Government more than $27 million for fraudulently overbilling service hours on Air Force contracts between 2010 and 2013.[2] In this case, and many similar cases, even though the Government recovered stolen money, the victimized unit will never get to spend it. Instead of the unit getting the

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[1] *Waste, Fraud, and Abuse in Federal Mandatory Programs: Hearing Before the H. Comm. on the Budget*, 108th Cong. 13 (2003) [hereinafter *Budget Committee Hearing*] (statement of David M. Walker, U.S. Comptroller Gen.).

[2] *Northrop Grumman Systems Corporation to Pay $27.45 Million to Settle False Claims Act Allegations*, U.S. DEP'T OF JUST., https://www.justice.gov/opa/pr/northrop-grumman-systems-corporation-pay-2745-million-settle-false-claims-act-allegations (Nov. 2, 2018).

money back, the Government deposited the money into the Treasury fund as a miscellaneous receipt, money which the unit could not access.[3]

Annually, Congress allocates a fixed sum of money to the Department of Defense (DoD) with guidance on how it will be spent; the DoD then allocates that money to subordinate agencies and units for mission accomplishment.[4] Every year, the DoD loses approximately 5% of this money to procurement fraud.[5] In theory, when the Government recovers defrauded money and the account is still open, it can be transferred as a refund to the original appropriation account that the unit may be able to utilize.[6] In practice, however, if the fund has expired, the Government may no longer obligate the money to new purchases, severely limiting its usefulness to the victimized unit.[7] If the Government recovers money after the account is closed, the Miscellaneous Receipts Act (MRA) requires its deposit in the general Treasury fund.[8] Though the Government as a whole recovers some money, the victimized unit sees none of it. As discussed in Part IV, cases in which recovered money must be deposited as a miscellaneous receipt are common because recovery efforts often continue for years beyond fund expiration.

This lost money most directly and acutely affects the individual victim-unit. Merely punishing bad actors does not return the victimized unit to the state in which it would otherwise be. While a private citizen can seek compensation for wrongs, the rules limiting how federal agencies can spend recovered money thwart any opportunity to restore the victimized unit to its original financial position. This article proposes a legislative solution that would allow the Government to return recovered funds directly to the victim-unit for the original intended purpose. Congress should create a statutory exception to the MRA for procurement fraud recoveries that allows the Government to refund recovered money to the same fund in the current year's appropriated fund. This is necessary for restitution to become meaningful to the victim, achieve congressional intent, and better align fraud-fighting incentives down to the local level, which will increase local unit participation in detecting and prosecuting fraud cases.

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[3] 31 U.S.C. § 1552(b).
[4] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).
[5] *See, e.g.*, U.S. DEP'T OF NAVY, 2017 ANNUAL CRIME REPORT 7 (2018).
[6] Appropriation Acct.—Refunds & Uncollectables, B-257905, 96-1 CPD ¶ 130 (Comp. Gen. Dec. 26, 1995).
[7] 31 U.S.C. § 1553(a).
[8] *Id.* § 3302(b).

Part II begins by describing procurement fraud's impact on the DoD. Part III describes how procurement fraud is addressed and the types of remedies available to the Government. Part IV addresses what happens to recovered money and the limits placed on appropriated funds. Part V surveys existing statutory exceptions to the MRA and identifies common features. Part VI proposes a statutory exception to the MRA for procurement fraud cases. Finally, Part VII addresses policy implications of the proposal, contrasts the proposal to other possible solutions, and discusses potential impacts.

II. Procurement Fraud's Impact on the Department of Defense

The Appropriations Clause of the Constitution established that federal agencies need statutory authority to spend money.[9] Each year, Congress passes appropriation and authorization acts that specify how much money is divided into each fund (sometimes called "pots of money") and how that money may be used.[10] This money, subject to express limits described, is apportioned to each federal agency in the designated amounts by the Office of Management and Budget.[11] Agency heads may further divide the funding to subordinate sections in formal divisions, which are then divided further through informal subdivisions.[12]

Spending in excess of a formal subdivision violates the Antideficiency Act.[13] If a unit spends more than its informal subdivision of funds, it will likely run afoul of agency and internal regulations.[14] This limited funding is what each unit must use to accomplish its mission. Five percent of the DoD's annual appropriated dollars are lost to fraud, leaving victimized units with even less money than Congress intended for them to have to accomplish their missions.[15]

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[9] U.S. CONST. art. I, § 9, cl. 7.
[10] *See* 31 U.S.C. § 1301.
[11] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2, sec. B.5.a (4th ed. 2016); 31 U.S.C. § 1512.
[12] 31 U.S.C. §§ 1513, 1514.
[13] *Id.* §§ 1341(a)(1)(A), 1517(a)(2).
[14] This could potentially violate the Antideficiency Act if the spending also exceeds the formal subdivision.
[15] *See, e.g.*, U.S. DEP'T OF NAVY, *supra* note 5; ASS'N OF CERTIFIED FRAUD EXAM'RS, REPORT TO THE NATIONS: 2020 GLOBAL STUDY ON OCCUPATIONAL FRAUD AND ABUSE 4, 9 (2020), (estimating that organizations across the world lose 5% of their annual revenue to fraud).

Only a small portion of procurement fraud is detected and prosecuted.[16] In fraud-related actions from fiscal years (FYs) 2013 to 2017, the Government collected over $792 million combined in criminal cases (including restitution, fines and penalties, and through forfeiture of property) as well as $5.9 billion in civil judgments and settlements.[17] Those recoveries, combined across the entire Federal Government in five years, amount to less than 20% of what the DoD is expected to lose to fraud in FY 22.[18]

The direct victim of procurement fraud is the military unit for whom the goods or services were intended. Despite the unit not receiving the benefit of the goods or services for which it paid with its limited funds, it still needs to accomplish its mission. Since the unit still needs the goods or services for which it contracted, it will cost additional money from its already-strained budget to re-procure what it did not receive. That harm is exacerbated by the secondary effects, including the steps necessary to mitigate the damage such as stopping payments and halting performance.[19] This is also a drain on the unit's supporting contracting office, which must duplicate efforts to re-procure the goods. The new tasks the unit and contracting personnel will incur in support of investigation and litigation (e.g., preserving evidence, providing statements) raise the burden imposed on the unit and compete for time with the performance of normal duties.

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[16] *See* Jonathan C. Martin, *Reviving the Program Fraud Civil Remedies Act: Encouraging Widespread Utilization Through Financial Incentives and a Centralized Administrative Tribunal*, 46 PUB. CONT. L.J. 913 (2017) (discussing the lack of prosecution of small- and mid-dollar procurement fraud cases and the under-utilization of administrative remedies nominally available to agencies).

[17] OFF. OF THE UNDER SEC'Y OF DEF. FOR ACQ. & SUST., REPORT TO CONGRESS: SECTION 889 OF THE FY 2018 NDAA REPORT ON DEFENSE CONTRACTING FRAUD 2 (2018) [hereinafter FY2018 NDAA REPORT].

[18] This value is based on the $738 billion FY 2020 defense budget described in the House Armed Services Committee's summary of the fiscal year 2020 National Defense Authorization Act, *see FY20 NDAA Summary*, HOUSE ARMED SERVS. COMM., https://armedservices.house.gov/_cache/files/f/5/f50b2a93-79aa-42a0-a1aa-d1c490011bae/3552B8ED0CB74FB28CC88F434EFB306A.fy20-ndaa-conference-summary-final.pdf (last visited Aug. 31, 2022), with the assumption that 5% of this budget ($36.9 billion) will be lost to procurement fraud.

[19] *See* FAR 32.006-4(a); 10 U.S.C. § 2307(i).

III. Procurement Fraud Response and Remedies

As of March 2020, 23% of the Office of the Inspector General's Defense Criminal Investigative Service's ongoing investigations involved procurement fraud allegations.[20] When units report suspected procurement fraud, they trigger a complex series of events involving a collaborative effort between multiple offices within the DoD and Department of Justice (DoJ).[21] As cases move from investigation to litigation, DoJ's Criminal Division is the lead agency, and non-criminal remedies must be coordinated through it.[22] The DoJ encourages its attorneys to collaboratively consider all available criminal, civil, administrative, and contractual remedies in procurement fraud cases, but they are limited by practical considerations such as grand jury secrecy.[23]

Various criminal statutes are applicable in procurement fraud cases. Several procurement fraud-specific statutes, such as the Procurement Integrity Act, carry both criminal and civil penalty options.[24] Along with criminal fines, the Procurement Integrity Act allows civil penalties of up to twice the amount fraudulently received plus a $50,000 fine per violation for individuals and a $500,000 fine per incident for organizations.[25]

Accompanying the fines is restitution. Criminal restitution is defined as the "full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation."[26] Unlike the punitive measures described above, the purpose of restitution is to restore the victim to *status quo ante* or to "make the victim whole again."[27]

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[20] INSPECTOR GEN., U.S. DEP'T OF DEF., SEMIANNUAL REPORT TO THE CONGRESS: OCTOBER 1, 2019 THROUGH MARCH 31, 2020, at 43 (2020).

[21] U.S. DEP'T OF DEF., INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES 18–20 (5 Mar. 2020) [hereinafter DODI 5525.07].

[22] U.S. DEP'T OF DEF., INSTR. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES para. 3(c) (12 May 2014) (C1, 7 July 2020) [hereinafter DODI 7050.05].

[23] U.S. Dep't of Just., Just. Manual § 1-12.000 (2018).

[24] 41 U.S.C. §§ 2101–2107.

[25] *Id.* § 2105(b).

[26] *Restitution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[27] CHARLES DOYLE, CONG. RSCH. SERV., RL34138, RESTITUTION IN FEDERAL CRIMINAL CASES 2 (2019) (citing Firefighters v. Stotts, 467 U.S. 561, 582, n.l5 (1984)).

Justice Department attorneys must weigh the viability of alternative remedies in lieu of prosecution, where issues such as proving intent and the higher burden of proof may not be feasible.[28] Whenever appropriate, the DoD expects the DoJ to pursue civil remedies to recover lost money.[29] Unlike criminal cases, civil suits cannot result in conviction or incarceration but do enable full monetary recovery, punitive fines, and enhanced damages. The Civil False Claims Act[30] (False Claims Act) has proven one of the most powerful tools in pursuing monetary recovery, resulting in nearly eight times as much monetary collection in fraud cases compared to criminal cases from FYs 2013 to 2017.[31] The False Claims Act permits recovering money fraudulently obtained, up to treble damages, civil fines up to $10,000 (adjusted for inflation), and even recovering legal fees.[32]

One important tool in the False Claims Act is the *qui tam* provision, which allows third-party whistleblowers to sue private companies for fraud on behalf of the Government.[33] As an incentive to reward whistleblowers under this law, they are entitled to keep between 15% and 30% of any money recovered against the bad actor.[34] From 2017 to 2019, the DoJ's Civil Division reported recovering over $579 million in *qui tam* and non-*qui tam* fraud cases where the DoD was the primary victim agency.[35]

Administrative and contractual remedies may be used in conjunction with criminal or civil remedies or as a standalone course of action. The DoD's administrative remedies focus on ensuring that the bad actor is no longer permitted to do business with (or be employed by) the Government. This includes suspending and debarring contractors, suspending security clearances, and imposing disciplinary measures up to terminating Government employees involved in fraud.[36] When bad actors voluntarily provide restitution, debarring officials consider it to be a mitigating

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[28] U.S. Dep't of Just., *supra* note 23.
[29] DODI 5525.07, *supra* note 21, at 7, fig.1, para. E(2).
[30] 31 U.S.C. §§ 3729–3733.
[31] FY2018 NDAA REPORT, *supra* note 17.
[32] 31 U.S.C. § 3729(a)(1)(G), (a)(2)–(3); *id.* § 3730(d), (g).
[33] *Id.* § 3730.
[34] *Id.* § 3730(d).
[35] This does not account for matters delegated to regional U.S. Attorneys' Offices. *Fraud Statistics–Overview*, U.S. DEP'T OF JUST. 8, https://www.justice.gov/opa/press-release/file/1233201/download (last visited Aug. 31, 2022).
[36] *See generally* FAR subpts. 9.4, 3.1.

factor in debarment determinations,[37] but the DoD's administrative remedies currently do not have viable avenues to affirmatively pursue restitution unless the DoJ will litigate the case.[38]

Contractual remedies are those a contracting officer takes within the confines of a contract. These remedies are contained in contract clauses, as dictated by various sections of the *Federal Acquisition Regulations* (FAR).[39] There are a variety of FAR-based actions that the contracting officer can take against the contract, such as withholding payments, denying claims, and pursuing counter-claims against the contractor.[40] Some contractual remedies, such as halting future payments, may happen while the investigation or litigation are pending. However, they must occur in coordination with the investigating agencies and the DoJ once it is determined that they will not interfere with criminal and civil proceedings.[41] These remedies, having lower burdens of proof and fewer procedural hurdles, are easier to pursue and may prevent the Government from losing more money to the fraudulent contractor. However, they offer few options for recovering money already disbursed that do not require outside agencies to get involved in lengthy and resource-intensive litigation.

IV. What Happens to Recovered Money

The MRA requires that any money received by an agent of the United States, including money recovered through criminal or civil remedies in fraud cases, be deposited into the general Department of Treasury (Treasury) fund unless an exception exists.[42] Generally, exceptions to the MRA require an express, specific statutory exception granting certain federal agencies the authority to deposit and use collected money

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[37] *Id.* 9.406(a)(5).
[38] Notably, the Procurement Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. §§ 3801–3812, allows agencies to pursue fraud claims valued up to $150,000, but the Department of Defense (DoD) does not utilize this statute because of its administrative burdens and lack of a Miscellaneous Receipts Act (MRA) exception for money recovered. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-275R, PROGRAM FRAUD CIVIL REMEDIES ACT: OBSERVATIONS ON IMPLEMENTATION 12 (2012) [hereinafter GAO-12-275R]. See discussion *infra* Part VI.B, for a discussion of the PFCRA, its limitations, and challenges implementing its use.
[39] *See, e.g.*, FAR 52.212-4(d).
[40] *See id.* 33.210(b), 32.006; 41 U.S.C. § 7103(c)(2).
[41] DODI 7050.05, *supra* note 22.
[42] 31 U.S.C. § 3302(b).

differently.[43] One of the most widely utilized MRA exceptions is refunds, which is one of two types of recognized "repayments" (the other being reimbursements).[44] Refunds are amounts collected from outside sources for "payments made in error, overpayment, or adjustments for previous amounts disbursed."[45] Refunds are "to be credited to the appropriation or fund account charged with the original obligation . . . ."[46] This means that agencies can spend refunded money the same as any other money in the account—the only exception to the MRA that does not require specific statutory authority.[47] Refunds are an important tool for correcting errors and resolving discrepancies without an agency routinely losing that money to the MRA.[48] Without this exception, overpayments caused by even minor clerical errors would be lost from the unit's funds even if promptly remedied.

A. Limitations Based on Time

As mentioned above, the same rules control refunds as well as other money in the account, including limits on when appropriated funds may be spent.[49] By default, appropriated funds remain available for one year unless expressly stated otherwise.[50] One year is the standard period of availability for Operations and Maintenance funds, while military construction funds are among the longer-lasting types, typically approved for five years.[51] Once an appropriation's period of availability expires, funds from that

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[43] Off. of the Comptroller of the Currency—Disposition of Amounts Received Through Its Lease of Off. Space, B-324857, 2015 WL 4647959 (Comp. Gen. Aug. 6, 2015).
[44] *See infra* notes 67–69 and accompanying text.
[45] 2 U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 6, sec. E.2.a.2 (3d ed. 2006) [hereinafter RED BOOK VOLUME 2].
[46] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 3, ch. 15, para. 3.5.1.2 (Feb. 2022); *see* 1 U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 5, sec. D.7.a (3d ed. 2004) [hereinafter RED BOOK VOLUME 1].
[47] RED BOOK VOLUME 2, *supra* note 45.
[48] *Id.*
[49] 31 U.S.C. § 1502.
[50] *Id.* § 1301(c); *see, e.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, § 8003, 132 Stat. 2981, 2998 (2018).
[51] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 3, ch. 13, para. 3.2.1.1.2 (Feb. 2022) [hereinafter DOD FMR].

appropriation may no longer be obligated for new procurements.[52] The expired account remains open for five years but may only be used to make adjustments to existing contracts or to liquidate obligations.[53] For example, settlement of a claim submitted in FY 2020 that originated in FY 2018 could be paid with FY 2018 funds, even if the fund has expired. The appropriation is permanently closed five years after it expires, and any remaining money in the account is returned to the Treasury fund.[54]

If the refund is collected after the appropriation has expired, but before it is closed, it gets deposited into the expired appropriation account and is "available for recording or adjusting obligations properly incurred before the appropriation expired."[55] Although a refund returned to an expired account may be used for adjustments, it may not be applied to new obligations.[56] If the refund is collected after the appropriated account has closed, the money must be deposited into the general Treasury fund, meaning the unit loses it completely.[57]

Units may treat money recovered in fraud cases, including criminal restitution or through civil suits, as a refund to the original account.[58] The amount recovered that may be treated as a refund is limited to actual damages, including the costs incurred investigating the fraud.[59] Amounts exceeding the refund (e.g., interest and penalty charges collected) must be deposited in Treasury as miscellaneous receipts.[60] Thus, if a procurement fraud case is resolved before the appropriation expires, the unit can receive meaningful restitution. If the account is expired but not closed, the unit may get the money redeposited into the same account but cannot actually use it to make new purchases, limited only to using it for adjustments to old purchases, if any should arise. Once the fund is closed, any recoveries made afterward will go to the Treasury fund and be completely inaccessible to the victim-unit.

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[52] 31 U.S.C. § 1553(a).
[53] *Id.*
[54] *Id.* § 1552(a).
[55] Appropriation Acct.—Refunds & Uncollectables, B-257905, 96-1 CPD ¶ 130 (Comp. Gen. Dec. 26, 1995).
[56] RED BOOK VOLUME 2, *supra* note 45.
[57] 31 U.S.C. § 1552(b); RED BOOK VOLUME 1, *supra* note 46.
[58] *See Appropriation Acct.—Refunds & Uncollectables*, B-257905.
[59] Tenn. Valley Auth.—False Claims Act Recoveries File, B-281064, 2000 CPD ¶ 41 (Comp. Gen. Feb. 14, 2000).
[60] RED BOOK VOLUME 2, *supra* note 45.

For this reason, once the appropriation has expired or closed, efforts by the victim-unit to support the procurement fraud recovery and enforcement actions are an additional burden without the hope of meaningful recovery for the unit. Thus, continued effort in procurement fraud actions from the unit's perspective violates the sunk cost fallacy of economic theory.[61] This fallacy occurs when an individual continues to pursue actions whose costs outweigh the benefits because the individual has already invested something that he or she does not want to lose.[62] If the resolution of procurement fraud cases takes so long that the unit loses hope of recovery, the unit is incentivized to avoid becoming further entangled in such cases so as to avoid devoting time and resources to a sunk cost. This is important because, under the current structure, the incentive structure for local units is not fully aligned with the Government's broader interest in aggressively identifying and prosecuting procurement fraud.

B. Why Does Recovering Stolen Money Take So Long?

The process of litigating procurement fraud cases typically takes several years and often endures beyond the expiration of most appropriated funds. Every stage of the process favors a slow, methodical approach that is at odds with timely restitution to the victim.

The statute of limitations to file a False Claims Act case is six years, but can be extended up to ten years under certain circumstances.[63] Once a False Claims Act case is initiated, the DoJ has a period of sixty days (subject to extensions) in which the case remains sealed until the DoJ decides whether to intervene in the action.[64] In 2008, *The Washington Post* reported a backlog of over 900 False Claims Act *qui tam* cases and that whistleblowers "routinely wait 14 months or longer just to learn whether the [DoJ] will get involved."[65] A 2006 Government Accountability Office (GAO) study of False Claims Act cases in which the DoJ intervened reported a median

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[61] *See* DANIEL KAHNEMAN, THINKING FAST AND SLOW 342–52 (2013), for further discussion of the sunk cost theory.
[62] *Id.*
[63] 31 U.S.C. § 3731(b).
[64] *Id.* § 3730(b).
[65] Carrie Johnson, *A Backlog of Cases Alleging Fraud*, WASH. POST (July 2, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/07/01/AR2008070103071.html.

duration of 38 months to resolution after DoJ intervention, with the range being from 4 to 178 months.[66]

More recent cases show this has not improved. The DoD Office of the Inspector General recently announced a settlement with a biotech company for fraudulent billing practices and violations of anti-kickback statutes.[67] The settlement was reached in September 2020, despite the misconduct's occurrence from 2009 to 2012.[68] In its semi-annual report to Congress, the DoD Office of the Inspector General cited over a dozen cases that were resolved in the six-month period ending on 31 March 2020.[69] Of those cases, the earliest misconduct for which a date was provided began in 2003 and the most recent began in 2016 and concluded in 2018.[70] While this report does not expressly describe the type of appropriated fund used in each case, given the nature of the procurements and the normal period for which fund types remain current, it is reasonable to conclude that the appropriated funds expired in the vast majority, if not all, of the cases described in the report before the parties reached settlement. In many cases, the expired funds have closed completely by the time the parties setttled.

Once a fraud case is completed, collecting restitution takes additional time. In a 2018 study, the GAO found that $34 billion in restitution was adjudged in federal criminal cases between 2014 and 2016 and that $2.95 billion in restitution was collected during that same period.[71] Of the $2.95 billion collected, $1.5 billion was from judgments ordered between 2014 and 2016, while the remaining $1.45 billion was from cases dating between 1988 and 2014.[72] This shows that a substantial portion of restitution is collected years, perhaps decades, after the enforcement action concludes.

As with other forms of white-collar crime, procurement fraud is complex. The number of agencies required to investigate, the multiple forums potentially required to adjudicate, and the volume of documentation

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[66] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-320R, INFORMATION ON FALSE CLAIMS ACT LITIGATION 12 (2006).

[67] Acting Manhattan U.S. Attorney Announces $11.5 Million Settlement with Biotech Testing Company for Fraudulent Billing and Kickback Practices, U.S. DEP'T OF JUST. (Sept. 22, 2020), https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-115-million-settlement-biotech-testing-company.

[68] *Id.*

[69] INSPECTOR GEN., *supra* note 20, at 43–50.

[70] *Id.*

[71] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 23 (2018).

[72] *Id.*

necessary to resolve a case requires a slow approach. Timely resolution might be at odds with other priorities in the case and with methodically pursuing justice. Put simply, it might not be in the Government's broader interests to rush these cases. Given the default period of availability of one year for most funds, it is easy to see how this process routinely goes well past this time, and often even beyond when the appropriation closes completely.[73]

V. Confronting the Issue: Getting Recovered Money Back to the Victim

The problem this article addresses is that victim-units cannot obligate money recovered after the appropriation has expired, and they cannot use it at all if it is recovered after the fund has closed, defeating the restitutional purpose of recovery. While the MRA and the prohibition against augmenting funds is fundamental to ensuring balance between the branches of Government through the power of the purse, many exceptions already exist. These exceptions are scattered throughout federal law, empowering various agencies to credit recovered money to their own funds and spend it alongside other appropriated money. Each of these statutory exceptions reflects a congressional recognition that unique circumstances of an agency's activity result in collected money that should be deposited directly to the agency's funds and spent by the agency without requiring new action by Congress.

A. Survey of Statutory Exceptions

Statutory exceptions to the MRA permit designated federal agencies to deposit money into their own funds to cover the costs of actions taken by the agency or be compensated for damages from third-party actors. The diverse statutes reflect the unique circumstances and types of recoveries the agency is expected to encounter.

Some of these exceptions are for reimbursements, which are either sums of money collected in compensation for the good or service purchased using that account or business-like transactions conducted by the Government.[74] An example would be the fee to visit a national park, which

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[73] *See supra* notes 50–51 (discussing default periods of fund availability).

[74] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 1, sec. A.4 (4th ed. 2016) [hereinafter RED BOOK CHAPTER 1].

the National Park Service can spend on land management without additional authorization from the Government.[75] Unlike refunds, reimbursements require specific statutory authority to be deposited into an agency's appropriated fund.[76]

1. Exceptions Applying to the Department of Defense

The following examples of MRA exceptions impact a broad range of DoD activities. Recently, the FY 2020 National Defense Authorization Act created a new law related to refunds for DoD personnel travel expenses,[77] permitting the DoD to deposit refunded money from travel expenses into the unit's Operations and Maintenance fund or its Research, Development, Test, and Evaluation fund.[78] This new authority expressly directs that the unit deposit refunded money into the current year's account when it is collected and that the unit may use the money only for official travel or efforts to improve efficiency of financial management of official travel.[79]

Congress authorized the Federal Emergency Management Agency to reimburse other federal agencies, including the DoD, for the support provided to activities under the Stafford Act.[80] Such reimbursements are credited to the appropriation(s) currently available for the same services or supplies.[81] Similarly, amounts paid by other U.S. Government agencies (or the United Nations)[82] to the DoD for expenses related to covered categories of foreign assistance are credited to the current applicable appropriation account.[83]

The DoD is authorized to sell lost, abandoned, or unclaimed personal property in its possession.[84] The proceeds of such sales may be credited to the local military installation's Operations and Maintenance fund to reimburse the cost of collecting, storing, and selling the property.[85]

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[75] 16 U.S.C. § 6806.
[76] DoD FMR, *supra* note 51, vol. 3, ch. 15, para. 3.5.1.1.
[77] National Defense Authorization Act for Fiscal Year 2020, § 606, Pub. L. No. 116-92, 133 Stat. 1198, 1424 (2019).
[78] 37 U.S.C. § 456(a).
[79] *Id.* § 456(a)–(b).
[80] 42 U.S.C. § 5147.
[81] *Id.*
[82] 10 U.S.C. § 2211.
[83] 22 U.S.C. § 2392(d).
[84] 10 U.S.C. § 2575(a).
[85] *Id.* § 2575(b)(1)(A).

Any proceeds from the sale exceeding actual costs incurred must be placed into a Morale, Welfare, and Recreation fund.[86]

Recoveries from affirmative claims against third-party tortfeasors for a Service member's medical bills are credited to the installation hospital's Operation and Maintenance fund and may be spent accordingly.[87] Money recovered in affirmative claims for damage to real property owned by military installations has a flawed statutory exception; it exempts the money from being deposited into the MRA, but the statute does not expressly authorize the recovered money to be spent by the unit, thus making this a flawed MRA exception.[88]

2. Exceptions Applicable to Other Federal Agencies

The examples below examples demonstrate MRA exceptions applicable to other federal agencies. The Department of State has multiple exceptions relating to funds collected from foreign governments. Regarding any sales under Title 22, Subchapter 1 (International Development), when funds are returned to the United States due to a contract's failure to conform to applicable statutes (deemed "illegal transactions"), the funds "shall revert to the respective appropriation, fund, or account used to finance such transaction or to the appropriation, fund, or account currently available for the same general purpose."[89]

When the Department of State receives money from foreign governments to be placed in trust for U.S. citizens pursuant to 22 U.S.C. § 2668a, that money is deposited into the Treasury fund, with appropriation authority to make payments to beneficiaries.[90] However, when the trust exceeds $100,000 in value, the Department of State may deposit between 1% and 1.5% of its funds into the International Litigation fund to cover the legal fees for asserting such claims.[91]

The U.S. Forest Service is authorized to reimburse itself for the cost of repairing damage to land under its management with money recovered from bonds forfeited under timber sales contracts, judgments, and claims

[86] *Id.* § 2575(b)(1)(B).
[87] *Id.* § 1095(g).
[88] *Id.* § 2782.
[89] 22 U.S.C. § 2355(c).
[90] *Id.* § 2710.
[91] *Id.* § 2710(e).

settlements from the incident that caused the damage.[92] This exception expressly states that any money collected exceeding actual costs is not exempt from the MRA.[93] Similarly, the DoJ may sell forfeited personal property under the Racketeer Influenced and Corrupt Organizations Act and use proceeds from the sale to cover costs of the forfeiture and sale, with excess proceeds deposited into the Treasury fund.[94]

B. Common Characteristics Among the Exceptions to the Miscellaneous Receipt Act

These listed exceptions are a sampling of those that exist.[95] Most exceptions are narrow and provide express guidance on the limits of the authority, including the appropriating language. Three relevant takeaways exist in these exceptions.

The first observation is the use of recovered funds to make the agency whole again. This places the agency in the position of having the same amount of appropriated dollars (in the same fund) as Congress intended in its original appropriation and authorization legislation. It further remedies the impact of the tortious or criminal behavior by returning the same amount of money as was spent addressing the incident.

The second is that Congress wrote statutes so that the agency will not receive a recovery windfall; excess funds beyond the actual damages and costs are not exempt from the MRA.[96] This ensures that the agency does not have the opportunity to obligate funds exceeding the amount Congress intended. This protects the policy objective of the prohibition against augmenting funds because it prevents these exceptions from expanding into alternative sources of revenue for the agency.

The third observation is that several of these statutes authorize the Government to place the recovered funds into the appropriation for the current FY at the time of recovery. In general, any federal agency may receive refunds under GAO guidance, but those refunds can only be placed

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[92] 16 U.S.C. § 579c.
[93] *Id.*
[94] 18 U.S.C. § 1963(f).
[95] See RED BOOK VOLUME 2, *supra* note 45, ch. 6, sec. E.2, for further discussion on exceptions to the MRA.
[96] One exception to this is 10 U.S.C. § 2575, which allows excess recovery to be deposited into the installation's Morale, Welfare, and Recreation fund. *See supra* notes 84–86 and accompanying text.

into the original year's appropriation (if it is still open).[97] As discussed above, the refunded money is subjected to the same temporal limitations as other money in the fund. Several of these statutory exceptions, however, bypass this limitation and expressly authorize collected money to be placed into the current year's fund.

VI. A Statutory Exception for Money Recovered in Procurement Fraud Cases

Congress should create a statutory exception to the time requirement allow the Government to return money recovered in procurement fraud cases to the victim-unit's current-year fund account of the same type as the one from which it was originally obligated. The statutory exception should always place the recovered funds into the current-year account, even if the original account is still open but expired. This is because an expired account cannot be used for new obligations,[98] and placing the money into an account with such limited functionality will not return the unit to its original position, nor will it empower the unit to obligate the money as Congress intended.

The proposed statute will require language expressly authorizing the victim unit to spend the funds.[99] As in similar statutory authority, the unit should be permitted only to deposit and spend the same amount of funds it can claim as damages: money actually disbursed but not refunded, as well as expenses incurred from remediating the fraudulent conduct (e.g., costs associated with disposing of nonconforming products). These costs would not include as damages any costs which are paid for through other appropriations.

A. Drafting the Procurement Fraud Exception

One of the challenges in creating a procurement fraud exception to the MRA is that there are so many statutory sources from which money may be

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[97] Appropriation Acct.—Refunds & Uncollectables, B-257905, 96-1 CPD ¶ 130 (Comp. Gen. Dec. 26, 1995).
[98] 31 U.S.C. § 1553(a); *see supra* note 52 and accompanying text.
[99] An MRA exception that does not also authorize the unit to expressly spend the funds is flawed and could result in an Antideficiency Act violation were the deposited money to be obligated. *See* 31 U.S.C. § 1341.

recovered. It would be impractical to separately draft statutory exceptions to all of the various criminal and civil statutes used in these cases. If an exception only included some statutes, it would undermine the use of the excluded statutes. Similarly, it would be unhelpful to draft a statute that enumerates only certain types of appropriated funds to the exclusion of others (i.e., a fund that only allows recovered money to be returned to an agency's procurement fund but not its construction fund). Rather, one centralized exception should exist that is broad enough to allow the Government to return recovered funds to the victim-unit in the appropriate fund type, regardless of the mechanism used to recover the funds. While the exception should broadly account for the types of money eligible to be counted as a refund, it must provide sufficient specificity as to which account is being credited.[100]

As in the exceptions cited above, the funds returned to the agency should be limited to those that directly reimburse the agency for actual expenses resulting from the fraudulent actions. These would include actual funds taken from the account as well as reimbursable expenses, such as for the storing and disposal of nonconforming products. Relying on the statutory language from the numerous examples cited, a proposed legislative solution could be as follows:

> With respect to matters of fraud involving obligated funds of the Department of Defense, any moneys recovered by the United States as a result of a judgment, compromise, or settlement of any claim, are hereby appropriated and made available to the account currently available for the same general purpose. Funds placed into this account shall not exceed (1) the amount that were disbursed but which the United States did not receive the goods or services contracted for as a result of the fraudulent conduct; and (2) the unreimbursed costs of any expenses incurred for repair or remediation, storage and disposal of abandoned goods, or that are a direct or proximate harm resulting from the fraudulent activity. Amounts so credited shall be available for use for the same purposes and under the same circumstances as other funds in the account. Provided, that any portion of the moneys so received in

[100] 31 U.S.C. § 1301(d).

> excess of the amounts described in (1) and (2) above shall be transferred to miscellaneous receipts.

VII. Policy Considerations About a Procurement Fraud Exception

It is important to consider and address the policy implications of the proposed statute. First is the question of whether this proposed exception is consistent with the constitutional principle allowing Congress to maintain control of how executive branch agencies spend funds. Second is the concern of procurement fraud recoveries becoming a source of revenue for the agency outside of the normal appropriations and budgeting process. Third is whether this proposal is effective at properly aligning fraud-fighting incentives at the local unit level to remedy the sunk cost dilemma.

A. The Legislative Proposal Is Consistent with Congressional Intent

The Constitution vested in Congress the "power of the purse" to keep the spending authority in the hands of elected representatives and as a check on power against the other governmental branches.[101] The MRA is foundational to Congress's power of the purse and the separation of powers.[102] The proposed statutory exception to the MRA is consistent with this power and achieves congressional intent with how and when funds may be spent. When Congress appropriates funds, it determines how much money each federal agency needs to accomplish its mission. It also sets time limits for when the funds can be spent.[103] Defrauded dollars cause the agency (and individual units) to have less money available to obligate than what Congress intended. Allowing the victim-unit to obligate recovered money as was originally intended is consistent with well-established precedent that money recovered in fraud actions is a form of refund.[104]

This proposal is not unique and does not change current practices, but rather it treats recovered money consistently regardless of how long the recovery process takes. Indeed, this proposal can best be described

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[101] RED BOOK CHAPTER 1, *supra* note 74, ch. 1, sec. A (citing THE FEDERALIST NO. 58 (James Hamilton)).
[102] *Id.*
[103] 31 U.S.C. § 1502.
[104] *See, e.g.*, Appropriation Acct.—Refunds & Uncollectables, B-257905, 96-1 CPD ¶ 130 (Comp. Gen. Dec. 26, 1995).

as achieving restitutional intent because the victim can use the recovered money as intended.[105] This prevents the unit from being penalized because of a lengthy recovery process, while also alleviating the DoJ and investigative organizations from any time-based pressure to rush to closure of a case.

This statutory proposal is analogous to the litigation exception to a fund's period of availability[106] and for using funds after resolving a bid protest.[107] The litigation exception utilizes a court's equitable authority to order that certain funds remain available while litigation is pending because the fund's closure would render the lawsuit moot.[108] The litigation exception recognizes the realistic and lengthy amount of time that it takes to resolve such disputes and accounts for it with a statutory exception anchored in principles of equity. Likewise, the amount of time it takes to resolve procurement fraud litigation is due to no fault of the victimized unit.

Notably, the litigation exception only keeps the funds available for the specific purpose that is contemplated in the litigation, whereas this article's proposal would keep the funds available for any use by the unit consistent with the purpose of the fund source. Both exceptions are analogous in their recognition that when the money can be spent is beyond the unit's control and is fully controlled by the litigation process. Unlike the litigation exception under which the funds are held for that purpose, funds in procurement fraud cases will likely be recovered long after the unit has already re-procured the good or service, because to do otherwise would seriously harm mission accomplishment. Thus, the procurement fraud exception must allow broader use of recovered funds to remain effective.

This statutory proposal is also analogous to the replacement contract exception, a well-established exception to time-based spending limits.[109] When a contractor is terminated for default but the need for the generally same service or good still exists, the originally obligated funds remain available for obligation for re-procurement, even if the fund has expired, so long as the re-procurement is completed without delay.[110] If the cost of re-procurement exceeds the original cost, additional funds from the otherwise-

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[105] See *supra* notes 26–27, for further discussion of restitutional intent.
[106] 31 U.S.C. § 1502(b); *see* RED BOOK VOLUME 1, *supra* note 46, ch. 5, sec. E.
[107] 31 U.S.C. § 1558.
[108] RED BOOK VOLUME 1, *supra* note 46, ch. 5, sec. E.
[109] *See* Lawrence W. Rosine Co., 55 Comp. Gen. 1351 (1976).
[110] *Id.*; *see* DoD FMR, *supra* note 51, vol. 3, ch.8, para. 3.5.3.

expired account may be obligated towards the re-procurement.[111] Money recovered from the contractor for whom the previous contract was terminated (such as from bonds) may be treated as a refund and utilized for the replacement contract as well.[112] In the GAO decision B-185405, the GAO deemed this practice the appropriate remedy because not allowing the agency to spend the recovered money accordingly would leave it "paying twice for the same thing . . . with the result in many cases that much if not all of the original expenditure would be wasted."[113]

The current limitations on returning refunds to the appropriated account after it has closed (and the similar limits to its use when it is expired but not closed) effectively thwart congressional intent for that money. These exceptions to the general rules show the historical importance placed on returning the victim-unit to its original position. Thus, this proposal is consistent with general congressional intent, preserving the power of the purse, and specifically with congressional intent as to time limits on use of funds.

B. The Legislative Proposal Is Limited to Traditional Restitutional Objectives

The second concern also relates to the importance of congressional control over the purse. Congress has a strong interest in maintaining control over the appropriations process and units' budgets. Procurement fraud recoveries should be a path toward neither the DoD having another revenue source outside of congressional control nor units augmenting their appropriated funds. An unlimited exception to MRA would be just that: a way for the DoD to augment its funds without Antideficiency Act concerns or congressional oversight. The proposed legislative solution is designed consistently with traditional principles of restitution: returning the victim to its original, pre-crime status without undermining Congress's distinct interest in controlling appropriated funding.[114] The amount of money returned to the victim-unit would match the amount historically returned in

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[111] DOD FMR, *supra* note 51, vol. 3, ch. 10, para. 3.8.
[112] Army Corps of Eng'rs—Disposition of Funds Collected in Settlement of Faulty Design Dispute, 65 Comp. Gen. 838 (1986).
[113] *Id.*
[114] *See* RED BOOK VOLUME 2, *supra* note 45 ("The rationale for crediting refunds to an appropriation account is to enable the account to be made whole for the overpayment that gave rise to the refund.").

similar instances for refunding erroneously disbursed funds and reimbursing expenses. Any excess money recovered, such as through fines or treble damages, would still be deposited into the Treasury fund as miscellaneous receipts. Thus, the victim-unit would not receive a windfall or be able to create an additional source of revenue through the affirmative pursuit of procurement fraud actions. However, as would be discussed in the next section, this restitution would create an incentive to support procurement fraud enforcement actions even beyond the expiration and closure of the appropriated funds because the victim-unit would still have the opportunity to receive restitution.

C. This Proposal Is the Best Method to Align Interests and Achieve Comprehensive Reform

Third, the proposed legislation would more fully align objectives of the victim-unit and the local contracting office with the broader interest of the Government in detecting, reporting, and prosecuting bad actors who commit fraud. As previously mentioned, for a unit to initiate a procurement fraud investigation is to take a course of action that would require follow-on effort to continue to support investigation and litigation long after the victim-unit's hope of recovering funds has passed.

Currently, the victim-unit's incentives best align with the course of action of treating these matters as errors rather than fraud and pursuing remedies within the contract without alleging fraud, even though those remedies may prove limited.[115] Contractual remedies may fix the immediate defect and possibly recover some money for the organization without the effort of investigations or supporting complex litigation. However, contractual remedies preclude punitive action against the bad actor and make it less likely that the bad actor will be held fully accountable. Without holding these bad actors accountable, their fraud will go unpunished, allowing them to do it again on other Government contracts.

Growing focus on this problem has led to multiple recent proposals. While these proposed solutions offer important contributions to the conversation, none offer a comprehensive solution comparable to the legislative proposal contained in this article. One proposed solution, raised in a 2011 paper, is to increase the use of alternative administrative remedies at the agency level, such as through the Procurement Fraud Civil Remedies

[115] See, e.g., GAO-12-275R, *supra* note 38, at 24–25, for further discussion.

Act (PFCRA).[116] The PFCRA[117] allows federal agencies, after coordination with the DoJ, to litigate low-dollar-value contract fraud cases against contractors before administrative law judges, similar to False Claims Act litigation.[118] Addressing a matter through alternative dispute resolution or lower-level administrative hearings is potentially faster than criminal and civil remedies, but the DoD does not currently use the PFCRA because it is procedurally burdensome, requires the use of administrative law judges that the DoD does not have, and does not contain an MRA exception.[119] The PFCRA is also jurisdictionally limited to cases of $150,000 or less, making it difficult to identify cases where the dollar value would justify the costs of litigation, especially since the agency will bear the costs but will not receive the recovered money.[120] Since its creation, only three federal agencies have used the PFCRA with any significant frequency.[121]

The 2011 paper's proposal would streamline PFCRA usage, increase the jurisdictional ceiling to either $500,000 or $1 million, and allow a small portion of PFCRA recoveries to be placed into a revolving fund to cover enforcement and litigation costs.[122] The recommendation did not include allowing units to keep any of the recovered money for restitution. Thus, victim-units would get more involved in fraud enforcement, theoretically addressing an enforcement gap,[123] but would not be any closer to remedying the fraud's impact on the unit. This is not an adequate solution to the problems identified because the cost of litigation alone may be sufficient incentive for the DoJ, which has the primary purpose of enforcement actions; it would not be enough reason for DoD units to get more involved

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[116] Lieutenant Colonel Charles Kirchmaier, *Treating the Symptoms but Not the Disease: A Call to Reform False Claims Act Enforcement*, 209 MIL. L. REV. 186, 219 (2011).
[117] 31 U.S.C. §§ 3801–3812.
[118] *Id.* § 3803.
[119] Kirchmaier, *supra* note 116, at 219–24; 31 U.S.C. § 3806(g)(1); *see also* Trevor B. A. Nelson, *A Restitution Alternative for Department of Defense Agencies to Combat Program Fraud Civil Remedies Act-Level Cases Under Far 9.4*, 44 PUB. CONT. L.J. 469, 480–85 (2015).
[120] 31 U.S.C. § 3803(c)(1).
[121] Martin, *supra* note 16, at 924. Perhaps it is not a coincidence that two of these three agencies that most often use the PFCRA have a statutory exception to the MRA written into the PFCRA, permitting money recovered in PFCRA actions to be deposited in the agencies' respective funds instead of being returned to the Treasury fund. *See* 31 U.S.C. § 3806(g)(2).
[122] Kirchmaier, *supra* note 116, at 219–20.
[123] Studies estimate that the DoJ refuses to accept approximately 60% of False Claims Act cases because the dollar value is too low. *See* Nelson, *supra* note 119, at 470; *see also* Martin, *supra* note 16.

in litigating fraud enforcement, where it would distract from their key military missions while offering very little in new benefits.

The suggestions in the 2011 paper were addressed in a 2017 paper that recommended that money recovered by agencies in PFCRA actions be entirely exempt from MRA, with funds first going to refund the agency and the remainder funding future investigations and litigation.[124] The 2017 paper also recommended fixing administrative hurdles to effective PFCRA use, such as streamlining the referral process by removing the DoJ approval requirement, and allowing an existing forum, such as the Armed Service Board of Contract Appeals rather than administrative law judges, to handle cases.[125]

There are two problems with implementing the 2017 paper's recommendations. First, it is limited to the PFCRA, instead of implementing a solution with broader applicability to all fraud cases. Even if the PFCRA's dollar limit were raised, it would still only incentivize units to pursue fraud cases within that dollar value window. It would not resolve the sunk cost fallacy as it applies to larger dollar value cases. This would have the unfortunate result that victim-units may be interested in pursuing small dollar cases unilaterally, but they would not be incentivized in supporting the DoJ in the largest fraud cases that may reach the millions or billions of dollars in stolen funds. Second, this solution would not differentiate money recovered that compensates for actual damages from that money which exceeds the harm inflicted (such as money recovered where treble damages or other fines are permitted). For that reason, this solution could actually create a stream of revenue for the DoD that falls outside of congressional control, thus violating the concerns over power of the purse discussed previously.

These papers' suggestions have merit and could go a long way toward increasing procurement fraud enforcement of small-dollar-value actions. The success of medical affirmative claims lends credibility to these solutions. After an exception to the MRA was passed for money recovered by the DoD in medical affirmative claims[126] and resources were put into place empowering installations to pursue these claims by local agencies, the amount of money recovered increased over seventeen-fold (from $1.5

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[124] Martin, *supra* note 16, at 914.
[125] *Id.* at 922–26.
[126] *See supra* note 87 and accompanying text.

million to $26 million) in twelve years.[127] However, those proposals would require wholesale statutory restructuring of the PFCRA procedures, a statutory exception to the MRA that is not currently in place, and building the infrastructure into the DoD to pursue such cases. Such recoveries would also still be limited by the PFCRA's statutory ceiling of cases valued $150,000 or lower, unless the cap is raised.

In comparison, implementing this article's proposed MRA exception would go beyond the limited application of the recommendations of how to fix the PFCRA and would achieve faster results. Amending the PFCRA would still require implementing infrastructure to enforce the violations before the first money would be recovered—a process that could take years without the guarantee of substantial monetary recovery. This article's proposed MRA exemption would have immediate results because it would apply to any monetary recovery including cases being actively litigated. Further, while the changes to the PFCRA are limited to the value ceiling contained in the statute (or as amended according to the above recommendations), this article proposes a solution across the spectrum of procurement fraud cases without regard to dollar value of the case—including PFCRA cases. Thus, while the proposed changes to the PFCRA only address the sunk cost dilemma for small-dollar cases, this article proposes a way to align the incentives of fighting procurement fraud in all cases regardless of dollar value.

Recognizing the difficulty in securing statutory changes to the PFCRA, a 2015 paper proposed a different solution utilizing purely contractual remedies.[128] This paper suggested interpreting FAR 9.406-1(a)(5) as empowering an agency to accept restitution as an equitable remedy during suspension and debarment proceedings and to directly deposit the recovered money in the victim-unit's fund as a refund.[129] This restitution would then be considered as a mitigating factor in the contracting officer's responsibility determination as well as in any suspension and debarment determinations.[130]

This proposal is unlikely to succeed because it is difficult to see the upside to the contractor agreeing to provide restitution under these circumstances. As discussed, there is an enforcement gap in low-dollar-

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[127] Major Mary N. Milne, *Staking a Claim: A Guide for Establishing a Government Property Affirmative Claims Program*, ARMY LAW., Aug. 2012, at 17, 19.
[128] Nelson, *supra* note 119, at 489–90.
[129] *Id.* at 491–92.
[130] *Id.*

value fraud due to the DoJ's disinterest in prosecuting such cases and the lack of alternative remedies available to the agency.[131] If the contractor agrees to pay restitution, this would be a tacit admission of fraud they otherwise would not need to make. Even if not suspended or debarred, such admission would need to be included in the Contractor Performance Assessment Reporting System report [132] and would appear in the contractor's performance evaluations when competing for future contracts. This may not be as serious as debarment, but it certainly will damage the contractor's ability to compete for future contracts.

Acknowledging culpability may also open the contractor or individual employees to additional consequences, as a confession makes a case much easier for the DoJ to prosecute.[133] Thus, such a confession and voluntary restitution payment—weighed against the alternative consequences—may not result in many contractors agreeing to these terms.

After reviewing these alternative options, the proposed legislative solution of an MRA exception for procurement fraud recoveries is the only option that will fully align the interests of victimized units and enforcement efforts by removing the sunk cost fallacy. The statutory change proposed could provide the impetus for implementing other solutions; particularly recommendations for improving the PFCRA, as these other papers suggested.

VIII. Conclusion

Prosecuting and deterring procurement fraud are important objectives. An equally important objective is empowering units to achieve their mission objectives by making sure that they have the amount of funding that Congress intended. Congress should create a statutory exception to the MRA for procurement fraud recoveries allowing the Government to refund recovered money to the same fund from the current year's account. The proposed solution is a viable way to address the problem defined in this article. It would support the basic criminal justice principle of making the actual victim whole and would better align incentives towards the policy goal of increasing the detection and prosecution of procurement fraud

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[131] *See supra* note 118 and accompanying text.

[132] *See* FAR 42.1501(a)(6).

[133] This assumes that such a negotiated remedy between the contractor and contracting officer does not include a promise of immunity from the DoJ, where the admission and restitutional payment will not be used as evidence against the contractor in any future enforcement actions.

down to the local unit level. It will accomplish this while abiding by the prohibition against augmenting funds and respecting Congress's power of the purse.

By allowing the victimized unit to be compensated from recovered funds, it will incentivize taking a larger, more proactive role in the procurement fraud process. Such increased incentive could be the impetus for the DoD to find more opportunities to improve procurement fraud response processes. As the Comptroller General stated in his testimony before the Budget Committee in 1993, fraud against the Government is not a victimless crime, and preventing it is a worthy cause to protect the taxpayers as well as the legitimate program beneficiaries.[134]

[134] *Budget Committee Hearing*, *supra* note 1.