IS THE PROCUREMENT INTEGRITY ACT "IMPORTANT" ENOUGH FOR THE MANDATORY DISCLOSURE RULE? A CASE FOR INCLUSION

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I. INTRODUCTION

A June 2008 white paper by the Department of Justice's National Procurement Fraud Task Force[1] ("NPFTF") describes the Procurement Integrity Act ("PIA")[2] as an "important statute" in the Government's fight against corruption in government contracting.[3] Indeed, and as set forth in more detail below, the PIA prohibits the knowing disclosure and receipt of confidential procurement information, restricts government employees from negotiating employment with contractors during a procurement, limits specified former government employees' post-government employment opportunities, and establishes an "impressive array" of criminal, civil, and administrative penalties for those who violate it.[4] Nevertheless, the PIA does not appear to be a part of the Government's most recent attempt to enhance the procurement system's integrity: the mandatory disclosure rule.

Issued on November 12, 2008, the mandatory disclosure rule requires federal government contractors to "timely disclose" "credible evidence" of a "violation of Federal criminal law involving fraud, conflict of interest, bribery,

1. The U.S. Department of Justice (DoJ) established the National Procurement Fraud Task Force ("NPFTF") in October 2006 in order to "promote the prevention, early detection, and prosecution of procurement and grant fraud." *See About the Task Force*, U.S. Dep't of Justice, http://www.justice.gov/criminal/npftf (last visited Oct. 17, 2010).

2. *See generally* 41 U.S.C. § 423 (2006).

3. Nat'l Procurement Fraud Task Force, U.S. Dep't of Justice, Procurement Fraud: Legislative and Regulatory Reform Proposals iv (2008) [hereinafter NPFTF White Paper], *available at* http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf.

4. *See infra* notes 28–36 and accompanying text. *See generally* 41 U.S.C. § 423(a)–(e); FAR 3.104-3(a)–(d), 3.104-7, 3.104-8; Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673, 681 n.16 (1998).

or gratuity violations found in Title 18 of the United States Code; or a violation of the civil False Claims Act."[5] This unprecedented rule indicates the Federal Acquisition Regulation (FAR) Council's acknowledgment of the need "to emphasize the critical importance of integrity in contracting."[6] Yet since the PIA is neither a Title 18 statute nor a part of the civil False Claims Act, the mandatory disclosure rule does not require contractors to disclose their violations of it.

The omission of the PIA seems odd considering that the agency that called it "important" was the same agency that recommended the mandatory disclosure rule. The FAR Council promulgated the mandatory disclosure rule in response to a request by the Department of Justice's (DoJ) Criminal Division.[7] In fact, the Criminal Division proposed language for the rule, which the FAR Council largely adopted.[8] Notably, the NPFTF, which had described the PIA as an "important statute" at around the same time as the drafting of the mandatory disclosure rule, is based in the Criminal Division.[9] So what happened, then, to the "important" PIA in between June and November 2008, as the rule was being drafted?

This Article advocates amending the mandatory disclosure rule by adding the PIA to it. It proceeds as follows. Part II will provide a brief overview of the PIA's specific provisions. Next, Part III will look at the procurement system's experience with the PIA by examining the reported criminal prosecutions and published bid protests that have involved the statute. Since the passage of the PIA in 1988 there have been only six reported criminal prosecutions and 137 published bid protests involving the PIA, resulting in five convictions and two

5. Fed. Acquisition Circular ("FAC") 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,065 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52). The mandatory disclosure rule also requires a contractor to disclose any "significant overpayments" that it may receive. *See id.*

6. *Id.* at 67,071. The FAR Council has acknowledged that "[t]here is no doubt that mandatory disclosure is a 'sea change' and 'major departure' " for the procurement community. *Id.* at 67,069.

7. *See* Robert K. Huffman & Frederic M. Levy, *Guide to the Mandatory Disclosure Rule: Issues, Guidelines, and Best Practices, Report of the Task Force on Implementation of the Contractor Code of Business Ethics and Conduct and Mandatory Disclosure Rule*, 2010 A.B.A. Sec. Pub. Cont. L. Rep. 19 [hereinafter *ABA MDR Guide*]. *See generally* Sandeep Kathuria, *Best Practices for Compliance with the New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulation*, 38 Pub. Cont. L.J. 803, 823 (2009).

8. *Compare* Letter from Alice C. Fisher, Ass't Att'y Gen., U.S. Dep't of Justice, Crim. Div., to Laurieann Duarte, Gen. Servs. Admin. (Jan. 14, 2008), *in ABA MDR Guide*, *supra* note 7, app. G-4 (suggesting the mandatory disclosure rule should include language requiring disclosures of incidences "involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18, United States Code"), *with* FAC 2005-28, 73 Fed. Reg. at 67,065 (setting forth the final mandatory disclosure rule as requiring disclosure of "a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code").

9. *See About the Task Force*, *supra* note 1.

sustained protests.[10] Interestingly, however, DoJ's proposed solution for the apparent "underuse" of the PIA is to change the remedies provisions of the statute,[11] not to include the statute in the mandatory disclosure rule.

Part IV will discuss the mandatory disclosure rule—in particular, how the rule came about, what it requires, and, more importantly, what it does not require, i.e., disclosure of PIA violations. Part IV attempts to show that any argument that the mandatory disclosure rule does require disclosure of a PIA violation is not compelling. Part IV will not discuss the propriety of the mandatory disclosure rule in general or go into detail concerning criticisms that commentators and observers have already raised.[12]

Part V will set out four specific reasons why the mandatory disclosure rule should include the PIA. Although very valid reasons exist against including the PIA in the mandatory disclosure rule, Part V nevertheless argues that including the PIA in the mandatory disclosure rule will assist the Government to detect violations, will enhance the statute's deterrent effect, will logically complement the mandatory disclosure rule's existing list of reportable statutes, and is entirely consistent with the mandatory disclosure rule's purpose. This Article concludes by suggesting a seven-word change to the mandatory disclosure rule that would add the PIA to it.

10. *See* Pricewaterhouse Coopers, Cracking Down: The Facts About Risks in the Procurement Cycle 6 (2009) [hereinafter Cracking Down], *available at* http://www.pwc.com/en_US/us/forensic-services/publications/assets/cracking-down.pdf (noting that the most common types of procurement misconduct appear to be bribery, embezzlement, bid rigging, false claims, and money laundering); *infra* notes 60–97, 118–22.

11. *See* NPFTF White Paper, *supra* note 3, at iv.

12. For an analysis of specific criticisms of the mandatory disclosure rule, see, for example, FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67.064, 67,066–90 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52); *ABA MDR Guide*, *supra* note 7, at 22–24; Rand L. Allen & Jon W. Burd, *New FAR "Mandatory Disclosure" Rule: Best Practices for Day One Compliance*, 90 Fed. Cont. Rep. (BNA) 443, 444 (2008) (noting that "there is a risk that a contractor may deem evidence not sufficiently "credible" to merit mandatory disclosure, only to have that determination called into question in a later suspension/debarment proceeding"); Jeremy A. Goldman, *New FAR Rule on Compliance Programs and Ethics: A Hidden Assault on the Corporate Attorney-Client Privilege*, 39 Pub. Cont. L.J. 71, 73 (2009) (arguing that the "least-clear aspect of the new rule is how the requirements for 'mandatory disclosure' . . . will affect the corporate attorney-client privilege"); Marcia G. Madsen & Roger D. Waldron, *The FAR Mandatory Disclosure Rule: Is This Supposed to Improve Acquisition?*, 90 Fed. Cont. Rep. (BNA) 419, 419 (2008) (arguing that the mandatory disclosure rule has "effectively shifted" "de facto management of the federal acquisition system . . . to agency inspectors general and the Department of Justice" and noting that the rule does not define "credible evidence" or "timely disclosure"); Mike S. Stanek, Note, *Gotta Have Faith: Why the New Contractor Ethics Rules Miss the Mark*, 38 Pub. Cont. L.J. 427, 443 (2009) (suggesting that the "mandatory disclosure provisions thus will force contractors to potentially forgo their right to attorney-client privilege" and contravene "due process rights"); Joseph D. West et al., *Contractor Business Ethics Compliance Program & Disclosure Requirements*, Briefing Papers 2d, Apr. 2010, at 1, 17–19.

II. FROM OPERATION ILLWIND TO THE PROCUREMENT INTEGRITY ACT

The U.S. procurement system survived for almost 200 years without the PIA. Operation Illwind[13] changed that. While the United States has been witness to procurement scandals since the beginning of the republic,[14] Operation Illwind, which uncovered the rampant exchange of confidential procurement information among government contracting personnel, contractors, and consultants,[15] was like no other.[16] The size of Operation Illwind was impressive, and the extent of wrongdoing disheartening. At its height, the investigation counted "[m]ore than fifteen hundred individuals . . . as subjects."[17] In addition, investigators placed sixteen of the nation's top twenty defense contractors under some form of scrutiny.[18] Ultimately, DoJ convicted ninety individuals and companies and collected more than $250 million in fines.[19]

It would be naïve to believe that the type of conduct that Operation Illwind discovered does not occur today, twenty years later. Whether it is occurring on the same scale, however, is another question. Still, it is imperative that the procurement community remain vigilant in addressing those circumstances that may give rise to PIA-like violations so that the conduct does not repeat itself to the same extent. The less scrupulous will always be looking for new and different ways to take advantage of circumstances allowing them improperly to benefit from exchanging confidential procurement information. As such, the procurement community as a whole must look for new and different ways to detect, deter, and punish those who seek to do so. One tool at their disposal is the PIA, perhaps Operation Illwind's most important legacy.

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13. Although most of the literature identifies "Illwind" as two words, the FBI's official code name for the investigation was actually just one word. *See* Andy Pasztor, When the Pentagon Was for Sale 188 (1995) (writing that agents "got a rise years later, amid the media frenzy, when reporters mistakenly identified the investigation's code name as two separate words").

14. *See generally* James F. Nagle, A History of Government Contracting (2d ed. 1999) (detailing procurement in the United States from the French and Indian Revolutionary Wars until the present).

15. Julian S. Greenspun, *1988 Amendments to Federal Procurement Policy Act: Did the "Ill Wind" Bring an Impractical Overreaction That May Run Afoul of the Constitution?*, 19 Pub. Cont. L.J. 393, 394 (1990).

16. Richard Bednar, *The Fourteenth Major Frank B. Creekmore Lecture*, 175 Mil. L. Rev. 286, 289 (2003) (describing Operation Illwind as "the largest procurement fraud investigation in . . . history"). Senator John Warner called the Illwind investigation " 'the most serious case' ever of improper conduct by Pentagon officials and military contractors." 44 Cong. Q. Almanac 449, 449 (1988).

17. Pasztor, *supra* note 13, at 318; *see also id*. at 34 (noting that "[m]ore than 190 individuals were under full-scale investigation").

18. *Id*. at 318.

19. *See* Bednar, *supra* note 16, at 290; Charles W. Hall, *Litton Industries Pleads Guilty, Closing Book on "Ill Wind" Scandal*, Wash. Post, Jan. 15, 1994, at A11.

In representing Congress's response to Operation Illwind,[20] the PIA was a fairly immediate one. Operation Illwind went public on June 14, 1988, when agents executed more than forty search warrants nationwide.[21] Five months later, in November, Congress passed the PIA. It did so as an amendment to the Office of Federal Procurement Policy Act, a statute that at the time was due for new funding authorization.[22] So sure was Congress that the procurement system required new legislation that it did not subject the amendments to "committee hearings, or agency and public comment."[23] Instead, the House and Senate agreed to the amendment's language as "an eleventh hour compromise . . . prior to adjournment of the legislative session."[24]

Congress did so to restore the public's confidence in public procurement.[25] Although Congress has since amended the original version of the statute,[26] the PIA still targets four areas: (1) disclosing confidential procurement information, (2) receiving confidential procurement information, (3) employment discussions between contractors and agency officials, and (4) post-government employment opportunities with a contractor.[27]

First, the statute prohibits "any person" from knowingly disclosing confidential bid, proposal, or source selection information prior to the award of

20. 134 Cong. Rec. 32,156 (1988) (statement of Sen. Glenn) (stating that the PIA was intended to "correct the seedy trade of favors and information which [had] fueled the latest scandal [Operation Illwind]"); *see also* 134 Cong. Rec. 23,590 (1988) (statement of Rep. Horton) (noting that the PIA is intended to combat "procurement fraud and abuses"); H.R. Rep. No. 100-911, at 20–21 (1988) (stating PIA's purpose is to abate "insider trading of sensitive procurement information").

21. *See* Ruth Marcus & Caryle Murphy, *"Ill Wind": A Scandal Overblown?*, Wash. Post, Dec. 27, 1988, at A1; *see also In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 577–78 (8th Cir. 1988) (listing the locations that were the subject of the search warrants, including the offices and residences of government officials and contractor personnel).

22. *See* Office of Federal Procurement Policy Amendments of 1988, Pub. L. No. 100-679, 102 Stat. 4063 (1988).

23. Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673, 680 n.14 (1998) (citing 134 Cong. Rec. 31,690 (1988) (statement of Sen. Levin)).

24. *Id.*

25. *See* 134 Cong. Rec. 32,156 (1988) (statement of Sen. Glenn).

26. The PIA has been amended several times since its enactment in 1988. The most significant amendment occurred in 1996 as part of the Clinger-Cohen Act. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 659–65 (1996). Before the Clinger-Cohen Act, the PIA applied to "competing contractors" and "procurement officials" and applied to all procurements (including sole sourcing). Also, it contained prohibitions on giving and receiving gratuities and soliciting confidential procurement information, and required contractors and Contracting Officers to certify in writing that no known violation of the Act had occurred during the procurement, or if one had, it had been disclosed. *See generally* Office of Federal Procurement Policy Amendments of 1988, Pub. L. No. 100-679, 102 Stat. 4063. For a more detailed overview of the original statute and criticisms of it, see Elizabeth Dietrich, Note, *The Potential for Criminal Liability in Government Contracting: A Closer Look at the Procurement Integrity Act*, 34 Pub. Cont. L.J. 521, 524–25, 531–35 (2005); Sharon A. Donaldson, *Section Six of the Office of Federal Procurement Policy Act Amendments of 1988: A New Ethical Standard in Government Contracting?*, 20 Cumb. L. Rev. 421, 438–44 (1990); Greenspun, *supra* note 15, at 394–98.

27. 41 U.S.C. § 423(a)–(d) (2006).

a contract for a procurement concerning that information.[28] It also prohibits "any person" from knowingly obtaining that type of information.[29] The PIA does, however, contain a savings provision describing six circumstances under which the prohibition against disclosing or receiving confidential information does not apply.[30]

Second, the statute requires agency officials to report to a supervisor and to an ethics official any job offers from contractors competing for a contract with which the official is personally and substantially involved.[31] The affected agency official then must either reject the offer or disqualify himself from further participation in the procurement.[32] Furthermore, the PIA prohibits contractors from engaging in job discussions with an agency official if they know that the agency official has not reported the discussions and/or disqualified himself.[33]

Finally, the PIA limits some government officials' post-government employment opportunities. The statute provides that the procuring contracting officer, source selection authority, member of the source selection evaluation board, chief of a financial or technical evaluation team for the procurement, and the program manager, deputy program manager, or administrative Contracting Officer for the contract may not accept compensation from the contractor for one year.[34] The same prohibition applies to those who personally decide to award a subcontract, contract, modification, or task or delivery order exceeding $10 million to the contractor; establish overhead rates for contracts exceeding $10 million to the contractor; approve the issuance of contract payments exceeding $10 million to the contractor; or pay or settle a claim exceeding $10 million to the contractor.[35] Despite the PIA's post-government employment limitation, it permits a former agency official to work for a division or affiliate of the contractor, provided that division or affiliate is not producing the same or similar products or services as the entity of the contractor involved in the $10 million or more procurement.[36]

Those who violate the PIA face a range of potential administrative, contractual, civil, and criminal penalties.[37] The criminal penalties are a maximum

28. *Id*. § 423(a); FAR 3.104-3(a).
29. 41 U.S.C. § 423(b); FAR 3.104-3(b).
30. 41 U.S.C. § 423(h)(1)–(6) (exempting disclosures authorized by regulation, disclosures by contractors of its own information, disclosures by an agency after it has canceled a procurement, meetings between agency and contractor officials, or disclosures to Congress, the comptroller general, another federal agency, or a federal agency inspector general); *see* FAR 3.104-4(e)–(f).
31. 41 U.S.C. § 423(c)(1)(A); FAR 3.104-3(c).
32. 41 U.S.C. § 423(c)(1)(B); FAR 3.104-3(c)(1)(i)–(ii).
33. 41 U.S.C. § 423(c)(4); FAR 3.104-8(b).
34. 41 U.S.C. § 423(d)(1)(A)–(B); FAR 3.104-3(d)(1)(i)–(ii).
35. 41 U.S.C. § 423(d)(1)(C)(i)–(iv); FAR 3.104-3(d)(1)(iii)(A)–(D).
36. 41 U.S.C. § 423(d)(2); FAR 3.104-3(d)(3).
37. 41 U.S.C. § 423(e); FAR 3.104-7, 3.104-8. However, the criminal penalties exist only for those who knowingly receive or disclose confidential procurement information, and only then if the knowing disclosure or receipt was done for the purpose of getting something of value or to give or obtain a competitive advantage. *See* 41 U.S.C. § 423(e)(1)(A)–(B).

of five years of confinement and/or a fine.[38] For an individual, the civil penalties are $50,000 for each violation "plus twice the amount of compensation . . . received or offered for the prohibited conduct."[39] For an organization, the civil penalties are $500,000 for each violation, "plus twice the amount of compensation . . . received or offered for the prohibited conduct."[40] Additionally, the Government may cancel a procurement, rescind a contract, suspend or debar a contractor, or take adverse personnel action upon discovering a violation of the PIA.[41] Contractors believing that they have lost a government contract to a competitor because the competitor obtained confidential procurement information in violation of the PIA may protest the procuring agency's decision to award the contract.[42] The aggrieved contractor may seek relief from the awarding agency, the Government Accountability Office (GAO), or the Court of Federal Claims.[43] In order to protest a contract award before GAO, the protesting contractor must first report the alleged PIA violation to the awarding agency within fourteen days of discovering the violation.[44] This fourteen-day requirement does not apply at the Court of Federal Claims.[45]

As a result of the PIA, Congress improved upon the "confusing, complex, and unclear system of regulations governing disclosure of procurement information that predated [the PIA]."[46] But Congress did much more than that. The PIA represented the first procurement-specific anticorruption statute that penalized the exchange of confidential procurement information.[47] As such, the PIA broke new ground. Indeed, most would agree that "bribery is the primary form of corruption in the procurement process."[48] However,

38. *Id.* § 423(e)(1).
39. *Id.* § 423(e)(2).
40. *Id.*
41. *Id.* § 423(e)(3)(A)(i)–(iv).
42. *Id.* § 423(g).
43. *See* Major Erik A. Troff, *The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations*, 57 A.F.L. Rev. 113, 144 n.162 (2005).
44. 41 U.S.C. § 423(g).
45. *See* McKing Consulting Corp. v. United States, 78 Fed. Cl. 715, 722 n.12 (2007).
46. Jamie S. Gorelick & Paul F. Enzinna, *Restrictions on the Release of Government Information*, 20 Pub. Cont. L.J. 427, 443–44 (1991). However, the PIA has not removed all doubt regarding what constitutes confidential procurement information. In *Synetics, Inc. v. United States*, for example, an incumbent contractor alleged that its competitor had wrongfully obtained the salary, bonus, position, background, and availability information of Synetics employees, as well as a "keepers list," a document containing the names and positions of twenty-eight of the incumbent's employees with an opinion on their work habits and qualifications. 45 Fed. Cl. 1, 14 (1999). Finding no PIA violation, the court concluded that the compensation information did not meet the definition of contractor bid or proposal information and that the "keepers list" appeared to have been generally available. *Id.*
47. *See* H.R. Rep. No. 100-911, at 20–21 (1988).
48. Anne Janet DeAses, Note, *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process*, 34 Pub. Cont. L.J. 553, 554–55 (2005); *see also* Harold C. Petrowitz, *Conflict of Interest in Federal Procurement*, 29 Law & Contemp. Probs. 196, 196–97 & n.2 (1964) (explaining that bribery is "such a flagrant violation of public trust that it was understandably the first aspect of [official corruption] to be positively outlawed" and noting the first general bribery statute was enacted in 1853); Bayless Manning, Federal Conflict of Interest Law 4 (1964) (stating that, in terms of official corruption, "[a]t one end of the spectrum . . . [is] bribery").

"there are many more intricate corruption schemes in which government and private actors participate."[49] The PIA reflects this reality, and accordingly, is the mark of a maturing procurement system.

Furthermore, the significance of the PIA should be patent. A system that allows competing contractors to obtain a competitive advantage by receiving, for instance, their competitor's proprietary or pricing information or the Government's evaluations of each proposal, ultimately discourages honest contractors from participating in the process.[50] As a result of this decline in competition, the Government will not receive the best value for its purchases.[51] DoJ therefore accurately characterized the PIA as an "important statute." It strengthens the competitive process.

III. CRIMINAL PROSECUTIONS AND BID PROTESTS INVOLVING THE PROCUREMENT INTEGRITY ACT

Although DoJ called the PIA an "important statute," it also called it an "underused" one as well.[52] Judging by the number of reported criminal prosecutions and published bid protests filed under the PIA, since those actions are most capable of being known,[53] DoJ may be correct. So far it appears

49. DeAses, *supra* note 48, at 555.

50. *Cf.* United States v. Purdy, 144 F.3d 241, 244 (2d Cir. 1998) (quoting H.R. Rep. No. 99-964, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5960, 5962) (stating that kickback activity corrupts the federal procurement system and drives out honest competitors).

51. Troff, *supra* note 43, at 121.

52. *See* NPFTF White Paper, *supra* note 3, at iv.

53. As noted earlier, the PIA provides for a range of remedies other than criminal prosecution or bid protest. *See supra* notes 37–45 and accompanying text. However, considering the types of remedies, the precise number of cases involving the PIA is likely unknowable. For instance, the Government does not make available the number of personnel actions taken or contracts it has canceled as a result of PIA violations, nor does it typically publish the specific basis for suspension and debarment decisions. Although the Excluded Parties List System shows which contractors and individuals have been suspended or debarred, it does not provide the specific basis. *See* Excluded Parties List Sys., http://www.epls.gov (last visited Oct. 17, 2010). Moreover, although DoJ notes the number of civil cases it prosecutes each year by general category, such as fraud, it does not identify which statutes in particular those cases involved. However, even a cursory Internet search reveals that DoJ has obtained civil settlements under the PIA. For example, the first "significant" civil settlement occurred in 1995, when a government contractor, Management Sciences for Health, Inc., paid $400,000 to settle a PIA violation for hiring a former government employee. Press Release, U.S. Dep't of Justice, U.S. to Receive $400,000 from Newton Company in First Major Civil Case Under Federal Integrity Law, U.S. Attorney Announces (Oct. 3, 1995). *See generally* United States v. Smith & Nephew Richards, No. sa-96-ca-1210, 1997 U.S. Dist. LEXIS 22939 (W.D. Tex. Mar. 7, 1997) (discussing civil PIA suit); Civil Settlement Agreement between the United States and The Boeing Co., at 1–2 (June 20, 2006), *available at* http://www.corporatecrimereporter.com/documents/boeing_002.pdf; Mike Carter, *Ex-FAA Officer Pleads Guilty*, Seattle Times, Dec. 15, 2007, at B2; Press Release, U.S. Dep't of Justice, FAA Contracting Officer Indicted in Procurement Fraud Conspiracy (Mar. 2, 2007), *available at* http://www.justice.gov/criminal/npftf/pr/press_releases/2007/mar/03-02-07rferrell-indict.pdf; Press Release, U.S. Dep't of Justice, Two Former Boeing Managers Charged in Plot to Steal Trade Secrets from Lockheed Martin (June 25, 2003), *available at* http://www.justice.gov/criminal/cybercrime/branchCharge.htm (noting that a former Lockheed Martin employee, Kenneth Branch, allegedly brought Lockheed's proprietary documents with him when he went to work for Boeing).

that DoJ has prosecuted six criminal violations of the PIA.[54] The GAO and the Court of Federal Claims have reviewed 137 published protests alleging PIA violations.[55] Thus, over the past twenty years, the procurement community has seen a criminal prosecution stemming from an alleged PIA violation approximately once every three years, and seven bid protests each year. Although numbers tell only a part of the story—indeed, the few reported prosecutions and published bid protests could be the result of the resolution of PIA violations under the PIA's other remedies—these numbers do not indicate frequent use of the PIA. Nevertheless, a review of the reported cases may offer some insights as to why this "important statute" should be made a part of the mandatory disclosure rule.

A. *Criminal Prosecutions*

Congress's almost immediate reaction to Operation Illwind, passing the PIA within five months of learning about the investigation and well before any prosecutions began, reflected a certain sense of urgency to cure a present evil. DoJ's response to the PIA, on the other hand, does not suggest a similar sense of urgency. The "first-ever trial of criminal PIA charges occurred in March 2003," or approximately fifteen years after it became available as a tool for law enforcement.[56] Since then, DoJ has brought an additional four prosecutions.

1. Methodology

DoJ's prosecution statistics do not specify the number of PIA prosecutions it has conducted. Accordingly, identifying its criminal enforcement activity of the PIA required a search of the Transactional Records Access Clearinghouse ("TRAC"), a database maintained by Syracuse University,[57] for all records citing the PIA, 41 U.S.C. § 423.[58]

54. *See infra* notes 144–45 and accompanying text.

55. *See infra* notes 113–22 and accompanying text.

56. Thomas S. McConville, *The Procurement Integrity Act: A Little-Used but Effective Statute in Criminal Prosecutions*, Procurement Law., Fall 2007, at 3; *see* Standards of Conduct Office, U.S. Dep't of Def., No. 04-05, SOCO Advisory (May 13, 2004) [hereinafter SOCO Advisory] (confirming that the convictions of Ronald Parrish and Richard J. Moran "for criminal violations of the PIA are the first obtained in the nation"). *See infra* Part III.A.2.a.

57. *See About Us*, Transactional Recs. Access Clearinghouse, http://trac.syr.edu/about TRACgeneral.html (last visited Oct. 17, 2010). The mission of the Transactional Records Access Clearinghouse ("TRAC") is to

> provide the American people—and institutions of oversight such as Congress, news organizations, public interest groups, businesses, scholars and lawyers—with comprehensive information about staffing, spending, and enforcement activities of the federal government. . . . An essential step in the process of providing this information to the public is TRAC's systematic and informed use of the Freedom of Information Act (FOIA). . . . TRAC continuously uses [FOIA] to obtain new data about government enforcement and regulatory activities.

Id. The Project on Government Oversight ("POGO") uses TRAC when analyzing trends with respect to particular criminal statutes. *See* E-mail from Scott Amey, Gen. Counsel, Project on Gov't Oversight, to author (Sept. 29, 2009) (on file with author) (noting POGO used TRAC to

2. The Cases

a. United States v. Parrish

The first PIA prosecution, *United States v. Parrish*, concerned a scheme involving Richard J. Moran, Richard Carlisle, and Ronald Parrish.[59] Moran ultimately pleaded guilty to conspiracy and bribery charges.[60] Carlisle and Parrish, on the other hand, pleaded not guilty to a number of crimes, including violations of the PIA.[61]

Moran, an army colonel, and his Contract Support Division chief Parrish were stationed in South Korea at U.S. Army Contract Command.[62] In 2001, the command sought to award a contract for computer services.[63] The contract was valued at $217,000.[64] Carlisle worked for American Management Services ("AMS"), the incumbent.[65]

In July 2001, AMS submitted a bid, which included its cost and pricing information, to secure the follow-on contract.[66] Parrish reviewed all of the proposed bids and forwarded AMS's bid to Carlisle, who by that time owned his own company, and in September 2001, Carlisle's company submitted its own bid.[67] Carlisle cut and pasted AMS's proposal into his, as both contained the same typographical errors.[68]

Although Parrish admitted at trial that he knew giving Carlisle the information conveyed a competitive advantage, his and Carlisle's primary defenses were that AMS had already been rejected and that Carlisle did not obtain a benefit since he already knew how to perform the contract.[69] The jury rejected that defense, and Carlisle received a prison sentence of twenty-four months,

"review conflict of interest and ethics violations from 18 USC [sic]"). According to Center for Public Integrity, "the Syracuse University-based Transactional Records Access Clearinghouse [is] a respected 20-year-old research center focusing on federal law enforcement staffing and spending." Nick Schwellenbach, *Fraud Cases Fell While Pentagon Contracts Surged*, Ctr. for Pub. Integrity (Apr. 1, 2009), http://www.publicintegrity.org/articles/entry/1243.

58. From 1998 through the present, TRAC showed sixteen referrals, five convictions, and one acquittal. Moreover, a combined search of DoJ's website and LEXIS-NEXIS, using the search terms "Procurement Integrity Act," "PIA," and "41 U.S.C. 423," returned records containing the facts and dispositions of these five cases.

59. Press Release, U.S. Dep't of Justice, Two Military Contractor Executives Plead Guilty to Conflict of Interest Charges Relating to Job Negotiations with Army Contract Officer, at 4 (July 25, 2005), *available at* http://www.justice.gov/usao/md/Public-Affairs/press_releases/press05/LeeMacumberPlea.pdf.

60. *See id*.; *see also* SOCO Advisory, *supra* note 56 (noting that Moran "pleaded guilty to two counts of conspiracy and one count of bribery"). *But see* McConville, *supra* note 56, at 4 (stating that Moran "pleaded guilty to the PIA charge").

61. *See* McConville, *supra* note 56, at 4.

62. *See id*.

63. *Id*.

64. *Id*.

65. *Id*.

66. *Id*.

67. *Id*.

68. *Id*. at 5.

69. *Id*.

and Parrish, eighteen months.[70] The facts did not indicate that money exchanged hands between Carlisle and Parrish.

b. United States v. Lessner

In September 2005, a federal district court judge convicted Barbara Lessner, consistent with her pleas, of wire fraud, obstruction of justice, and violating the PIA.[71] Her path to prison began at a bar where she met Scott Watanyar, a man with whom she would soon develop a close personal relationship.[72] When Watanyar learned that Lessner was a Contracting Officer for the Defense Logistics Agency, he expressed interest in his small electronics company doing contract work with the Federal Government.[73] Over the ensuing eight months, Lessner's office awarded Watanyar's company 163 contracts worth more than $3 million.[74]

Lessner committed a variety of misconduct during the award of these contracts, including violating the PIA. She would provide Watanyar his competitors' prices, identify the price he should bid to receive a particular contract, or advise him to submit lower bids.[75] However, no evidence suggested that Lessner received any money.[76] Following her plea, the court sentenced her to fifty-one months' confinement and to make restitution in the amount of $938,965.59.[77]

c. United States v. Olson

As an acquisition manager for the Federal Aviation Administration (FAA), Vicki Lynn Olson oversaw the procurement for a $4.2 million contract for runway lighting at Seattle-Tacoma International Airport.[78] The competition came down to two companies: Pacific Construction Services, Inc. ("PCL") and Donald B. Murphy Contractors, Inc. ("DBM"). PCL ultimately won the contract, but only because Olson provided it with DBM's pricing information.[79] Initially, PCL did not submit the lowest bid, but Olson advised PCL to reduce its bid by $55,000.[80] PCL reduced its bid as advised, and accordingly won the contract.[81] It is unclear why Olson favored PCL over DBM, but the evidence did not indicate that Olson received any money for her actions.

70. *Id*. at 6.
71. United States v. Lessner, 498 F.3d 185, 191 (3d Cir. 2007).
72. *Id*. at 189, 191.
73. *Id*. at 189.
74. *Id*.
75. *Id*. at 190.
76. *See id*. at 187–92.
77. *Id*. at 192.
78. Plea Agreement, ¶ 9(b)–(c), United States v. Olson, No. CR-07-51P (W.D. Wash. Feb. 20, 2007), *available at* http://www.usdoj.gov/usao/waw/press/2007/mar/pdfs/Olson%20plea%20agreement.pdf.
79. *See id*. ¶ 9(q)(5).
80. *See id*.
81. *See id*. ¶ 9(q)(6).

Olson pleaded guilty, and the district court sentenced her to three years' probation and 200 hours of community service.[82] DoJ did not charge PCL with criminal violations, but did settle a civil claim for $1 million.[83]

d. United States v. Ferrell

Robert Ferrell was Vicki Olson's subordinate and co-conspirator in providing PCL with DBM's pricing information.[84] Ferrell actually notified PCL to lower its bid.[85] The evidence did not show that Ferrell received any money for providing PCL with sensitive procurement information, but it did indicate that PCL treated Ferrell to meals and golf outings.[86] Ferrell pleaded guilty and received the same sentence as Olson: three years' probation and 200 hours of community service.[87]

Interestingly, a number of FAA employees wrote letters on Ferrell's behalf, drawing the ire of the sentencing judge.[88] She said she was "appalled" at the employees for writing such letters, finding that the "'whole agency [has] run afoul of what their duty is as a government agency.'"[89] She said, "'I am sad to see that there are still people in the office that think there was nothing wrong. . . . FAA employees shouldn't be taking a cup of coffee from anyone who is bidding on these contracts.'"[90]

e. United States v. Honbo

David Honbo, a civilian employee for the U.S. Army Corps of Engineers ("Corps") in Seoul, South Korea, worked as a quality management representative on a government contract to relocate the Army base in Yongsan, South Korea.[91] Honbo's plea agreement indicated that the contract was a "multi-billion dollar" contract.[92]

Honbo served as the recorder and project manager of the selection board during the Corps' evaluation of proposals.[93] As such, he had access to source selection information and bidders' proposal information, which he ultimately shared with a former colleague working for one of the contractors seeking the relocation contract.[94]

82. *See* Carter, *supra* note 53, at B2.
83. *See id.*
84. *See* Press Release, FAA Contracting Officer Indicted, *supra* note 53.
85. *See id.*
86. *See* Carter, *supra* note 53, at B2.
87. *See id.*
88. *See id.*
89. *Id.*
90. *Id.*
91. Plea Agreement, ¶¶ 1–9, United States v. Honbo, No. 08-cr-00177-RMC (D.D.C. July 22, 2008); *see* Pub. Integrity Section, U.S. Dep't of Justice, Report to Congress: The Activities and Operations of the Public Integrity Section for 2008, at 32 (2008) [hereinafter Pub. Integrity Section 2008 Report], *available at* http://www.justice.gov/criminal/pin/docs/arpt-2008.pdf.
92. *See* Pub. Integrity Section 2008 Report, *supra* note 91, at 32.
93. *See id.*
94. *See id.*

Honbo pleaded guilty to violating the PIA, and, in doing so, admitted that he shared the information of the board's deliberations for the purpose of giving his former colleague's company a competitive advantage.[95] The evidence did not show that Honbo received any monetary or other economic benefit for sharing the information. The district court sentenced him to thirty-six months of probation, 150 hours of community service, and a fine of $2,500.[96] In addition, the Government barred him from working for the U.S. Government for three years.[97]

3. Insights and Observations

Five cases may not establish any concrete or meaningful trends. Moreover, there may be additional cases in which DoJ could have charged a violation of the PIA but disposed of the case, for example, through pleas to more serious or different charges under other federal statutes.[98] Nevertheless, the five reported cases do offer some important insights.

First, each case so far has involved a prosecution of an individual—no firm has been charged as a criminal defendant.[99] This fact, though, does not necessarily mean that the firms were without fault. An employee is more likely and able to commit a PIA violation where the firm does not train the employee to abide by relevant rules or monitor the employee's conduct. In other words, firms that do not promote an environment encouraging ethical behavior and a commitment to compliance with the law will enable some employees' PIA violations, and will consequently likely increase the firm's exposure to criminal liability.[100] A mandatory disclosure requirement for PIA violations therefore

95. *See id*.; Plea Agreement, *supra* note 91, ¶ 2.

96. *See* Pub. Integrity Section 2008 Report, *supra* note 91, at 32.

97. *See id*.

98. In one recent case, DoJ obtained guilty verdicts to bribery when it appeared that the defendants had also committed a PIA violation. *See* Minute Entry, United States v. Heinrich, No. 08-cr-00128-CJB-DEK (E.D. La. Apr. 1, 2009); *see* Indictment, ¶¶ 4–5, 8(e), 10, 22–23, 43, 47, United States v. Heinrich, No. 08-cr-00128-CJB-DEK (E.D. La. May 15, 2008), *available at* http://www.justice.gov/atr/cases/f233700/233761.htm (providing that the defendants conspired to obtain "confidential bid, proposal, and source selection information to attempt to obtain contracts to provide goods and services of [the Army Corps of Engineer's] Hurricane Katrina Protection Project"); Press Release, U.S. Dep't of Justice, Former Sand and Gravel Subcontractor Sentenced to 5 Years in Prison After Conspiracy and Bribery Conviction in Connection with a Levee Reconstruction Project (Aug. 26, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/249478.pdf (noting defendants were convicted of conspiracy and bribery only).

99. As a general matter, a firm may be criminally responsible for an employee's crimes when those crimes furthered the firm's interests and were not solely for the employee's benefit. *See* United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 141 F.3d 405, 409 (2d Cir. 1998) (citing *In re* Ivan F. Boesky Sec. Litig., 36 F.3d 255, 265 (2d Cir. 1994)).

100. DoJ's Corporate Charging Guidelines indicate that a firm may improve its chances of avoiding criminal liability if it has a compliance program that is designed to prevent and detect misconduct in the first place and that is reviewed and monitored on a regular basis for effectiveness. *See* U.S. Dep't of Justice, Corporate Charging Guidelines § 9-28.800 [hereinafter Charging Guidelines], *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf (instructing prosecutors to determine "whether the corporation has adopted and implemented

should incentivize a firm to develop a comprehensive internal control system designed to encourage its employees to comply with all relevant laws, including the PIA.[101] Importantly, however, while mandatory disclosure may lessen the likelihood of criminal charges against the firm, the Government certainly would still pursue the PIA's noncriminal remedies against the firm. Firms cannot, and should not, expect to profit, in the form of receiving a government contract, as a result of their employees' misconduct.[102]

Not only was each of the above prosecutions just of an individual, but, with one exception, all prosecutions were of government employees. Although contractor employees, consultants, and other nongovernmental actors might want their competitors' confidential procurement information and go to great lengths trying to obtain it, DoJ may target government employees in particular considering the well-established principle that public officials must not use confidential information acquired in their official capacities for anyone's personal economic benefit.[103] True, a contractor could certainly try to break into their competitor's office space or hack into the Government's computer system to steal the information,[104] but more likely, it will obtain the information directly from the government employee himself.

The public expects more from government employees. As President Theodore Roosevelt once famously declared: "[T]here can be no greater offense against the government than a breach of trust on the part of a public official or the dishonest management of his office and, of course, every effort

a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation"). Further, when Congress passed the PIA, it intended the PIA's corporate criminal penalties to apply to situations where management officials knew or should have known of the PIA violation. *See* 134 Cong. Rec. 32157 (1988).

101. According to the Federal Acquisition Regulation (FAR) Council, "[e]xisting [Department of Justice] guidelines addressing corporate prosecution standards, while certainly not providing amnesty, suggest that if a company discloses such violations, the prosecution will be of the individuals responsible for the violation, not the entire organization." FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,071 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52). DoJ's Charging Guidelines do emphasize that a firm's decision to disclose its employees' crimes is a factor prosecutors consider in deciding whether to criminally charge the firm. *See* Charging Guidelines, *supra* note 100, § 9-28.750.

102. In the *Olson* and *Ferrell* cases, for example, see *supra* notes 78–90, DoJ did not prosecute Pacific Construction Services, Inc., for its participation in the scheme to obtain Donald B. Murphy Contractors, Inc.'s bidding information in the construction contract at the Seattle-Tacoma Airport. Instead, DoJ entered into a settlement with the firm for $1 million. *See* Carter, *supra* note 53, at B2.

103. *See generally* Petrowitz, *supra* note 48, at 197.

104. Press Release, Two Former Boeing Managers Charged, *supra* note 53 (noting that Kenneth Branch was a former Lockheed Martin employee who allegedly brought Lockheed's proprietary documents with him when he went to work for Boeing); *see* Computer Tech. Assocs., Inc., B-288622, 2001 CPD ¶ 187, at 2 (Comp. Gen. Nov. 7, 2001) (explaining that a Computer Technology Associates help desk operator hacked into the General Services Administration's e-mail system to obtain a competitor's proposal information); Civil Settlement Agreement Between the United States and The Boeing Co., *supra* note 53, ¶¶ 1–2 (suggesting that Boeing obtained Lockheed Martin's information by hiring an employee).

must be exerted to bring such offenders punishment by the utmost vigor of the law."[105] Since more often than not sensitive procurement information cannot fall into the wrong hands without a government employee's participation, government employees should be the primary targets of a PIA case. Thus, a rule requiring a contractor to disclose its PIA violations will also help the Government identify the potential misconduct of its own employees.

Notably, money never exchanged hands in these five cases—or at least the evidence did not suggest that it did. While the government employees had relationships with the contractors with whom they shared the information, the evidence did not suggest that the government employees were motivated by economic benefits. This fact contrasts sharply with the Operation Illwind cases, where inside information was almost always bought and sold. This is not to say that there were not any monetary or economic incentives at play in any of these cases. But, particularly in cases like *Lessner* and *Honbo*, the motivation could merely have been to help out a close friend or former colleague. A rule requiring contractors to disclose their procurement-related misconduct thus must ensure that it captures both the situation in which contractors obtain confidential procurement information in exchange for money as well as the situation in which another, nonmonetary motive may be involved. Indeed, both situations negatively impact the procurement process equally. As currently written, however, the mandatory disclosure rule may not adequately require disclosure of instances that do not involve the exchange of confidential information for money.[106]

Interestingly, no defendant received a particularly harsh sentence. This fact could undermine the deterrent effect of the PIA's criminal penalties. The unscrupulous, the desperate, and even the overzealous simply may be more tempted to trade confidential procurement information because the reward may exceed the risk of going to prison.[107] Judge Pechman's comments when she sentenced Ferrell seem less compelling in light of the punishment she ultimately imposed.[108] Although a criminal conviction may stigmatize an individual and lead to adverse collateral consequences,[109] the general deterrent effect of such a conviction loses some force when the likelihood of going to prison is very low. The "traditional criminal justice response has been

105. Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 Geo. L.J. 2307, 2314 (1998) (quoting *President Aroused*, L.A. Times, June 25, 1903, at 1).

106. *See infra* note 226 and accompanying text.

107. Contractors faced with the possibility of losing out on lucrative government contracts during economic downturns "may be more likely to view the rewards of an illegitimate or fraudulent act as greater than the risk of being caught and their desire to act ethically." Cracking Down, *supra* note 10, at 23.

108. *See supra* notes 84–90 and accompanying text (noting that the judge sentenced Ferrell to three years of probation and 200 hours of community service).

109. *See, e.g.*, United States v. Warren, 612 F.2d 887, 893 (5th Cir. 1980) (noting collateral consequences of a conviction to include social "[s]tigma," possible forfeiture of property, limitation on employment opportunities, and loss of some civil rights).

arrest, prosecution, and incarceration,"[110] not arrest, prosecution, and no incarceration.

Furthermore, in addition to the possibility that the PIA's criminal penalties might not serve as a significant deterrent, a criminal prosecution presents challenges for the Government that are not present when pursuing some of the PIA's other possible penalties. A criminal prosecution entitles a defendant to the right against self-incrimination, the right to a speedy trial, the right of compulsory process of obtaining favorable witnesses, the right against unreasonable searches and seizure, the right to counsel, and a due process right to discovery.[111] As such, the Government might be able to more easily and more efficiently accomplish its retributive, penal, and compensatory goals through, for example, a civil settlement or suspension or debarment—proceedings in which the putative party does not have the same rights.[112]

But to do so, the Government must still know of the violation in the first place. A mandatory disclosure rule would certainly help the Government identify violations. Such a rule of mandatory disclosure must cover any PIA violation, not just its criminal prohibitions, since violations of the PIA's noncriminal provisions would have the same anticompetitive effect as a criminal violation of the PIA. Moreover, the possibility that the deterrent effect of the PIA's criminal penalties may not be that significant as well as the challenges associated with criminal cases may make the PIA's noncriminal provisions a more preferable enforcement mechanism. For these reasons as well, any mandatory disclosure requirement for PIA violations should include noncriminal violations of the PIA.

110. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325, 1332 (1991); *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 20 (1988) (stating that "short but certain terms of confinement for many white-collar offenders" was an objective of the Federal Sentencing Guidelines project at inception); cf. Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 Cardozo L. Rev. 1611, 1648 n.147 (2007) (stating that "the prevailing view, at least among academics, is that deterrent and retributive aims can best be satisfied with white collar crime by sentences that are relatively short but that include imprisonment and the high probability of its imposition").

111. *See* Laura J. Kerrigan et al., *The Decriminalization of Administrative Law Penalties, Civil Remedies, Alternatives, Policy, and Constitutional Implications*, 45 Admin. L. Rev. 367, 374–75 (1993).

112. *See id*. at 375 (noting "'civil remedies offer speedy solutions'" (quoting Cheh, *supra* note 110, at 1329)); Cheh, *supra* note 110, at 1325 (noting a "tendency for the government to punish antisocial behavior with civil remedies"). Although the FAR expressly states that suspension and debarment are not punishment, *see* FAR 9.402(b), suspending or debarring an individual or entire firm from contracting with the Federal Government nevertheless could be devastating. *See* Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 Cath. U. L. Rev. 363, 364 (1995) (citing Section of Pub. Contract Law, Am. Bar Ass'n, The Practitioner's Guide to Suspension and Debarment 5–6 (1994)) (asserting that contractors "may fear a debarment or suspension far more than criminal or civil sanctions because of the potentially adverse economic effect on their operations").

B. *Bid Protests*

If criminal prosecution makes up a part of the "impressive array of enforcement mechanisms at the Government's disposal" to police the procurement system,[113] the bid protest system is a tool for contractors to enforce an honest and fair procurement system.[114] A contractor can choose from one of three fora in which to protest the award of a contract: the procuring agency, GAO, or the Court of Federal Claims.[115]

It is difficult to determine the precise number of protests that have involved the PIA. Federal agencies, GAO, and the Court of Federal Claims do not track protests by basis.[116] Moreover, while GAO receives approximately 1,500 protests per year, it reviews and issues decisions in only twenty-two percent of those cases; the remainder are dismissed, withdrawn, settled, or otherwise disposed without plenary review.[117] Thus, there may be many cases raising a PIA violation in which a competent authority never reaches the merits of the issue. Similarly, as discussed below, procuring agencies may remedy potential violations before the issue reaches GAO or the court.

1. Methodology

GAO and the federal courts have published 201 cases involving some reference to the PIA.[118] They fall into one of the following seven categories:

113. *See* Pikes Peak Family Hous., LLC v. United States, 40 Fed. Cl. 673, 681 n.16 (1998).

114. *See* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 694 & n.223 (2001) (suggesting that bid protests enable "contractor litigants [to] demonstrate the system's integrity and transparency, in effect advertising the existence of a level playing field"). The bid protest system provides "an important measure of transparency and accountability to public procurement systems" because it establishes "an important safeguard of proper adherence to procurement rules." Daniel I. Gordon, *Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make*, 35 Pub. Cont. L.J. 427, 428 & n.2 (2006) (quoting UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment, at Guide to Enactment ¶ 30).

115. *See supra* note 43 and accompanying text.

116. *See* Moshe Schwartz & Kate M. Manuel, Cong. Research Serv., No. R40227, GAO Bid Protests: Trends, Analysis, and Options for Congress 11 (2009) [hereinafter GAO Bid Protest Trends]; *see also* E-mail from Daniel I. Gordon, then-Acting Gen. Counsel, Gov't Accountability Office (GAO), to author (Nov. 18, 2009) [hereinafter Gordon E-mail] (on file with author). Notwithstanding the fact that GAO does not track protests by basis, anecdotal evidence indicates that PIA-based protests are not very common. Instead, one analysis offered the four most common protest grounds as (1) the procuring agency's failure to maintain adequate documentation, (2) the procuring agency's improper discussions with offerors, (3) improper cost evaluations by the procuring agency, and (4) the procuring agency's failure to adhere to the stated evaluation criteria. *See* GAO Bid Protest Trends, *supra*, at 11.

117. *See* GAO Bid Protest Trends, *supra* note 116, at introductory page (noting that although "the number of bid protests increased steadily from approximately 1,150 in Fiscal Year (FY) 2001 to over 1,550 in FY2008 . . . . Since FY2001, on average, GAO issued an opinion on only 22% of bid protests.").

118. A search was conducted of LEXIS's "Public Contracts Decs from Comptroller General, BCAs, All Federal Courts" database (from Jan. 1, 1988, through Jan. 9, 2010) and GAO's website,

	Category	Number of Cases
1.	PIA issue sustained	8
2.	PIA issue denied	56
3.	Nonresponsive for lack of PIA certificate[119]	51
4.	Case dismissed as untimely[120]	7
5.	Case deferred due to agency investigation	9
6.	Protestor challenges the agency's decision to disqualify the protestor based on the agency finding of a PIA violation	6
7.	Irrelevant[121]	64
	TOTAL	**201**

Discounting the sixty-four cases that did not adjudicate a PIA issue, GAO and the courts have reviewed a total of 137 cases. As Figure 1 depicts, ninety-eight were filed after Congress passed the PIA and before it amended it as part of the Clinger-Cohen Act in 1996.[122] Figure 2, then, shows that after Congress amended the law in 1996, contractors brought thirty-nine bid protests alleging a violation of the PIA.

using search criteria "PIA and (41 w/3 u.s.c. w/3 423!)," which returned 201 responsive cases. The author is grateful to Mr. Gordon for recommending this method for ascertaining the data for this section's discussion. *See* Gordon E-mail, *supra* note 116.

119. The original PIA, passed by Congress in 1988, required contractors and Contracting Officers to certify, in writing, that no PIA violation had occurred during the procurement or, if one had, that all known information regarding the violation had been disclosed. Office of Federal Procurement Policy Act, Pub. L. No. 100-679, 102 Stat. 4064 (1988) (codified at 41 U.S.C. § 423(d)(1) (1988)). The 1996 amendments jettisoned this requirement, much to the relief of contractors and Contracting Officers alike. Donald P. Arnavas, *The Procurement Integrity Act/ Edition II*, Briefing Papers, Nov. 1997, at 10 (stating that "[a]ll those involved in the procurement process have welcomed the elimination from the new Act of both contractor and Government certifications").

120. A contractor may not file a protest at GAO alleging a PIA violation unless it first reports the possible violation to the procuring agency within fourteen days of discovering the violation. 41 U.S.C. § 423(g) (2006).

121. Cases falling into this category include, for example, those that merely cited the PIA for comparison purposes, *see, e.g.*, Novell, Inc. v. United States, 46 Fed. Cl. 601, 612 (2000); those involving the Freedom of Information Act, *see, e.g.*, Legal & Safety Emp'r Research, Inc. v. Dep't of the Army, No. Civ. S-00-1748 WBS/JFM, 2001 U.S. Dist. LEXIS 26278, at *1 (E.D. Cal. May 7, 2001); and those in which the protestor expressly stated it was not asserting a violation of the PIA, *see, e.g.*, Hughes Space & Commc'ns et al., B-266225 et al., 96-1 CPD ¶ 199, at 15 (Comp. Gen. Apr. 15, 1996).

122. *See supra* note 26 and accompanying text.

2. Insights and Observations

As the foregoing demonstrates, fifty-one bid protests—more than one-third of all protests—challenged the agency's rejection of the bid as being nonrespon-

Figure 1: Number of PIA Protests Between 1990 and 1996

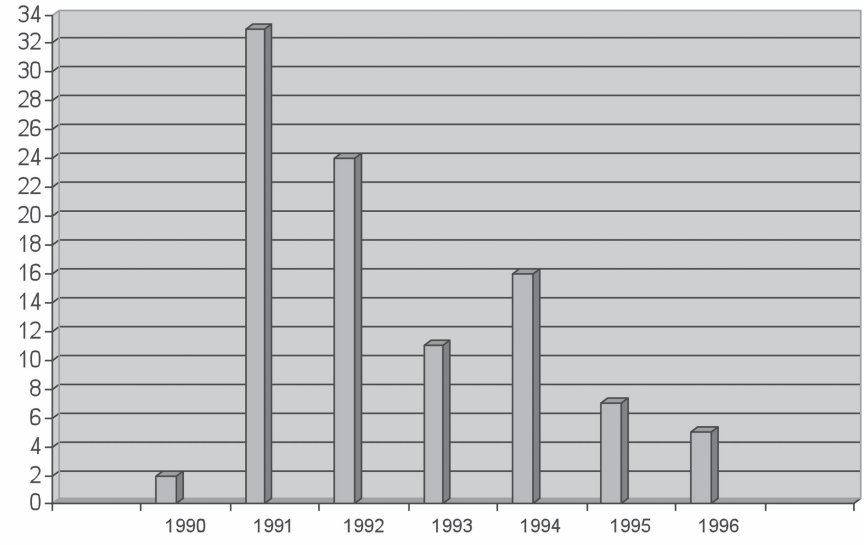
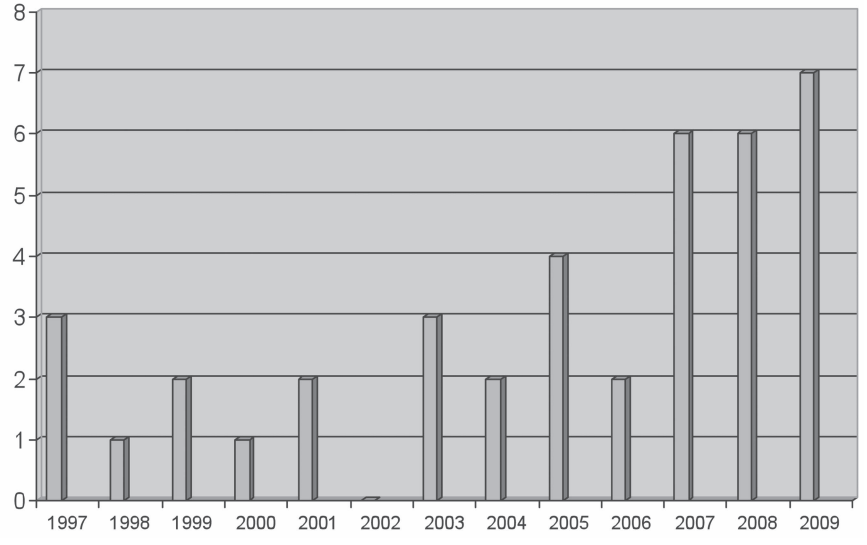


Figure 2: Number of PIA Protests Between 1997 and 2009



sive for failing to include the "draconian" PIA certificate.[123] Not coincidentally, once Congress removed that requirement, bid protests declined significantly.[124] Prior to the amendments, PIA protests averaged twelve per year.[125] Following the 1996 amendments, protests have declined to approximately three per year.

Interestingly, the procurement integrity certificate actually provided a protestor its best chance of succeeding in a bid protest. Of the eight protests that GAO and the court sustained, six concerned the procurement integrity certificate.[126] This fact seems ironic given the ultimate purpose of the PIA: to prevent the "trade of favors and information" that provides "competing contractors with an unfair advantage over their more scrupulous competitors."[127] If GAO or a court were to sustain a bid protest for a violation of the PIA, one might expect the violation to be of one of the PIA's substantive prohibitions. Remarkably, though, neither GAO nor the courts has yet to sustain a protest on the ground that a contractor knowingly obtained, or a government employee knowingly disclosed, confidential procurement information.[128] The two "substantive" cases in which GAO sustained a PIA bid protest concerned the PIA's revolving door provision.[129]

The foregoing statistics and results therefore do not appear to bode well for contractors believing they have been a victim of a PIA violation, and raise questions as to the effectiveness of GAO in particular as an anticorruption tool. With such a remote chance of success, contractors may be discouraged from even pursuing relief from GAO or the court. True, the likelihood of obtaining a favorable result at GAO in general is low. Of the twenty-two

123. McMaster Constr., Inc. v. United States, 23 Cl. Ct. 679, 686 (1991) (opining that having to reject bids that did not contain the required certificate as nonresponsive was "admittedly draconian"); *see also* Arnavas, *supra* note 119, at 10 (stating that "contractor certification requirements were especially burdensome because they prompted frequent protests and likely deprived the Government of many lower-priced contracts").

124. *See* Ralph C. Nash Jr. & John Cibinic Jr., *The New Procurement Integrity Rules*, 11 Nash & Cibinic Rep. ¶ 12, Mar. 1997, at 40 (stating that "the deletion of the certification requirements will undoubtedly also contribute to this reduction of protests").

125. *See id*. (stating that "[PIA protests] have been averaging approximately 12 per year"); Figure 1, *supra* (supporting this number).

126. *Compare*, *e.g*., M.R. Dillard Constr., B-271518 et al., 96-2 CPD ¶ 154, at 5–6 (Comp. Gen. June 28, 1996) (sustaining the protest and finding that the agency improperly rejected protestor's offer for lack of signature on the integrity certificate), *and* C.B.C. Enters., Inc., 72 Comp. Gen. 275, at 4 (1993) (sustaining the protest because agency improperly rejected the protestor's procurement integrity certificate), *and* Shifa Servs., Inc., 70 Comp. Gen. 502, at 4 (1991) (sustaining the protest and finding the solicitation confusing regarding the number of signatures required on procurement integrity certificate), *with* LBM, Inc., B-243505, 91-1 CPD ¶ 372, at 1 (Comp. Gen. Apr. 12, 1991) (finding that the lack of procurement certificate rendered bid nonresponsive).

127. 134 Cong. Rec. 32,156 (1988) (statement of Sen. Glenn).

128. *Cf*. Arnavas, *supra* note 119, at 9 (observing that prior to the Clinger-Cohen Act, all protests alleging improprieties with respect to the disclosure of confidential procurement information, though "frequent," had been denied).

129. *See* Express One Int'l, Inc. v. U.S. Postal Serv., 814 F. Supp. 93, 102 (D.D.C. 1992) (finding PIA violation where Postal Service allowed a consultant on a mail delivery contract to engage in job negotiations with a contractor competing for the contract); Guardian Techs. Int'l, B-270213 et al., 96-1 CPD ¶ 104, at 9–11 (Comp. Gen. Feb. 20, 1996).

percent of cases in which GAO issues an opinion, it sustained the protest approximately twenty percent of the time.[130] But in PIA cases, the sustain rate is even lower. Counting all sustained cases, including the procurement integrity certificate protests, the sustained rate of the 137 issued opinions is approximately six percent. Not counting those "technical" violations involving the certificate, the sustain rate drops to 1.5%. These numbers are more consistent with GAO's overall sustain rate of all cases filed, including those in which it does not issue a decision: five percent.[131]

Still, there is no denying the important functions that GAO and the Court of Federal Claims play. The possibility of a bid protest arguably makes most procurement professionals more vigilant in complying with their responsibilities to the law. One commentator has opined that the PIA protests filed at GAO and the court demonstrate "sensitivity that exists in this area."[132]

C. *Conclusion*

The number of reported cases involving the Procurement Integrity Act since its enactment seems to confirm the Department of Justice's claim that the PIA appears underused. A number of very valid reasons could explain this apparent "underuse."

For example, the mere existence of the statute itself could be an effective deterrent. This may be true not only because of the potential penalties for violating the PIA, but also because the PIA did not radically change procurement law. On the contrary, it largely codified existing norms. The confidential procurement information on which the PIA conferred statutory protection had enjoyed a long history of protection by regulations.[133] In addition to the potential contractual and administrative consequences, the penal code pro-

130. GAO Bid Protest Trends, *supra* note 116, at 4.

131. *See id*.

132. Arnavas, *supra* note 119, at 9 & nn.99–104 (discussing such allegations as an agency official's wife working for an eventual awardee, an awardee's representatives and an agency official spending time together at a trade show, and an agency engineer meeting with a bidder's employee on multiple occasions). Indeed, in *Accent Serv. Co*., incumbent Accent Service claimed a violation of the PIA where the agency official escorted a potential competitor to Accent's work site and disclosed Accent's staffing, even though that information was publicly available. *See* B-299888, 2007 CPD ¶ 169, at 2–4 (Comp. Gen. Sept. 14, 2007).

133. *See*, *e.g*., FAR 15.612(d) (1984) (prohibiting "Government personnel" from (1) disclosing technical solutions to help an offeror, (2) advising an offeror on its standing as to price related to other offerors, and (3) furnishing offerors information about other offerors' prices); *see also* FAR 15.413-2(d) (1984) (recognizing that release of confidential procurement information, pricing information, and the like prior to contract award "would seriously disrupt the Government's decision-making process and undermine the integrity of the competitive acquisition process"). The FAR went into effect on April 1, 1984, and established "a single regulation for use by all Executive agencies in their acquisition of supplies and services with appropriated funds . . . . The FAR, together with agency supplemental regulations, replace[d] the current Federal Procurement Regulations System, the Defense Acquisition Regulation, and the NASA Procurement Regulation." Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42,102, 42,102 (1983) (codified at FAR ch. 1).

The FAR's predecessors also protected procurement information against disclosure. *See*, *e.g*., 41 C.F.R. § 1-3.103(4)(c) (1984) (providing that "in no event will an offeror's cost breakdown,

vided criminal penalties for the improper use of disclosing and obtaining bid, proposal, or source selection information.[134]

The PIA may also not be that commonly used because the type of misconduct it targets is not as widespread as people may fear. The Federal Acquisition Institute issued a survey indicating that the civilian agency acquisition workforce consists of approximately 19,623 professionals.[135] Add to that number the 206,653 at the Department of Defense (DoD)[136] and the employees of the 85,000 defense contractors that do business with the Government,[137] and the number of procurement misconduct incidents is fairly small in general, and PIA violations no doubt even smaller. Thus, the few number of PIA prosecutions and bid protests could be because the problem simply is not that pervasive.[138]

Yet a third reason that may explain why there have been few PIA prosecutions and bid protests may be because PIA violations are handled by other means. Under FAR 3.104-7, procuring agencies have a number of options available to them upon learning of a potential PIA violation, including initiating an investigation, canceling the procurement, disqualifying an offeror, or rescinding an awarded contract.[139] Although no concrete data show how often procuring agencies avail themselves of these less formal means of disposing of PIA violations, anecdotal evidence would suggest it is fairly common.[140] After

profit, overhead rates, trade secrets, or other confidential business information be disclosed to any other offeror"); *id*. § 14-3.153(d)(1) (1984) (explaining that "trade secret information or confidential commercial and financial information shall be used by the Government only for the purpose of evaluating the proposal"); 32 C.F.R. § 3-507.2(a) (1984) (prohibiting the disclosure of a proposal's contents to anyone not having a legitimate interest in it). Thus, contractors and procuring agencies had a number of options available to them when competitors had obtained confidential procurement information. *See*, *e.g*., AT&T Commc'ns, Inc., GSBCA No. 9252-P, 88-2 BCA ¶ 20,805, at 105,116 (sustaining protest because a GSA procurement official had shared proprietary AT&T pricing information with Bell South, a competitor); McGown, Godfrey, Decker, McMackin, Shipman & McClane, 52 Comp. Gen. 773, at 5 (1973) (stating that the comptroller general can recommend cancellation of a solicitation that wrongfully discloses a protester's proprietary data or trade secrets); *see also* Metric Sys. Corp. v. United States, 13 Cl. Ct. 504, 505 (1987) (noting that an agency cannot provide information " 'to a prospective contractor if, alone or together with other information, it may afford the prospective contractor an advantage over others' " (quoting FAR 15.413-(b) (1986))).

134. *See*, *e.g*., United States v. McAusland, 979 F.2d 970, 972–76 & n.1 (4th Cir. 1992).

135. *See* Fed. Acquisition Inst., 2008 Acquisition Workforce Competencies Survey Results Report and Survey Content 2 (2008), *available at* http://www.fai.gov/pdfs/FAI%20Competencies%20Survey%20Results%20Report_Final_29%20Jul%202009_v2.pdf.

136. Schwellenbach, *supra* note 57 (citing DoD statistics for fiscal year 2004).

137. *See* U.S. Gov't Accountability Office, GAO-09-591, Opportunities Exist to Improve DOD's Oversight of Contractor Ethics Programs 1 (2009) [hereinafter GAO Ethics Rep.].

138. *Cf*. FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,070 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52) (acknowledging, but without conceding, that it may be "true that there are comparatively fewer [procurement fraud] violations now than 20 years ago").

139. FAR 3.104-7(b)–(d).

140. *See*, *e.g*., Kellogg Brown & Root Servs., Inc., B-400861, 2009 CPD ¶ 54, at 9–10 (Comp. Gen. Feb. 23, 2009) (approving of agency's decision to disqualify contractor after it had received

all, the statute requires a contractor to give notice to the procuring agency before filing a protest, a requirement GAO has expressly recognized as providing the agency an opportunity to conduct an investigation into the matter and take remedial action if appropriate.[141] Accordingly, some cases simply may not warrant criminal prosecution or a bid protest, or can be more effectively handled by some other means.

Finally, the apparent "underuse" of the PIA may be the result of the fact that violations go undetected. No one can seriously say that the Government is aware of every PIA violation when it occurs. This possible reason for any "underuse" raises the question of why the mandatory disclosure rule does not include the PIA. It would seem that a rule like the mandatory disclosure rule, which requires contractors to help the Government identify and discover misconduct in connection with a procurement, would necessarily include a procurement-specific rule such as the PIA.

What makes this question particularly interesting is that it was DoJ that suggested the need for the mandatory disclosure rule.[142] Rather than suggest the PIA's inclusion in the mandatory disclosure rule, however, DoJ recommended changing the PIA's remedies provisions as a way to cure its "underuse."[143] However, changing the PIA's remedies is unlikely to result in more use of the PIA. On the other hand, not only will adding the PIA to the mandatory disclosure rule likely lead to an increase in its use, it will, as set out in Part V, improve the statute's effectiveness in the fight against procurement-related misconduct.

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and potentially used competitors' confidential proposal information); Computer Tech. Assocs., Inc., B-288622 et al., 2001 CPD ¶ 187, at 6 (Comp. Gen. Nov. 7, 2001); Superlative Techs., Inc., B-310489.4, 2008 CPD ¶ 123, at 4 (Comp. Gen. June 3, 2008) (noting agency had canceled solicitation following discovery that official had provided awardee with confidential information to prepare proposal); Info. Ventures, Inc., B-241441 et al., 91-2 CPD ¶ 583, at 5 (Comp. Gen. Dec. 27, 1991) (approving of agency's decision to cancel protestor's contract and recomplete solicitation after protestor had improperly received and used competitor's confidential proposal information); Compliance Corp., B-239252, 90-2 CPD ¶ 126, at 7 (Comp. Gen. Aug. 15, 1990) (finding agency's decision to disqualify offeror reasonable where offeror improperly obtained or attempted to obtain competitor's proprietary information); Universal Automation Labs, Inc. v. Dep't of Transp., GSBCA No. 12370-P-R, 94-1 BCA ¶ 26,475, at 131,798 (finding a PIA violation can be ameliorated in a manner short of canceling an acquisition). When contractors "violate statutes designed to protect the integrity of the procurement process," the Government has specific authorization to "void and rescind" affected contracts. Claude P. Goddard Jr., *Business Ethics in Government Contracting—Part II*, Briefing Papers, June 2003, at 1, 12 (citations omitted) (noting that this rule applies regardless of "any actual corruption or loss to the Government").

141. *See* SRS Techs., B-277366, 97-2 CPD ¶ 42, at 2 (Comp. Gen. July 30, 1997).

142. Letter from Alice C. Fisher, Ass't Att'y Gen., U.S. Dep't of Justice Crim. Div., to Paul A. Dennett, Adm'r, Office of Fed. Procurement Policy (May 23, 1997), *reprinted in ABA MDR Guide*, *supra* note 7, app. D-1 [hereinafter Fisher Letter].

143. *See* NPFTF White Paper, *supra* note 3, at iv (stating that the NPFTF was "examining the Procurement Integrity Act, 41 U.S.C. § 423, for possible changes—particularly with respect to its remedies provisions"). The NPFTF White Paper, however, did not explain what possible changes the NPFTF was considering.

IV. THE MANDATORY DISCLOSURE RULE

The mandatory disclosure rule requires contractors to report credible evidence to the relevant inspector general and Contracting Officer of violations of federal criminal law found in Title 18 of the U.S. Code, violations of the civil False Claims Act, and significant overpayments.[144] Contractors that fail to make a required disclosure risk suspension and debarment from future government contract opportunities.[145] This rule represents a fundamental change for the procurement system.[146] Prior to the FAR Council promulgating the mandatory disclosure rule, the procurement system operated under a regime that merely recommended and encouraged contractors to make voluntary disclosures of any wrongdoing that they may have committed in connection with a federal procurement.[147] Thus, although the Government has long recognized the need for contractors' help in detecting procurement improprieties, the Government has only recently determined that it is necessary to require that help. Still, the rule that the Government has issued does not appear comprehensive. It does not include the PIA, and any argument that it does is misplaced.

A. *The Voluntary Disclosure Program*

The new mandatory disclosure rule largely replaces a program that encouraged voluntary disclosure of procurement-related misconduct. In 1986, the DoD instituted its voluntary disclosure program in response to the recommendations of President Reagan's Blue Ribbon Panel on Defense Management, also known as the Packard Commission.[148] President Reagan established the Packard Commission partly as a result of the public perception that private contractors placed profits above legal and ethical obligations and, consequently, routinely engaged in corrupt practices.[149] Accordingly, the

144. *See* FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,065 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52). The propriety of the mandatory disclosure rule goes beyond the scope of this Article. Instead, this Article focuses on the mandatory disclosure rule as it relates to the Procurement Integrity Act. Thus, this section will not discuss many aspects of the mandatory disclosure rule that have received significant comment elsewhere. For a general overview of the many potential issues with the mandatory disclosure rule, see generally *ABA MDR Guide*, *supra* note 7, at 22–24; Kathuria, *supra* note 7, at 824, 828; West et al., *supra* note 12, at 17, 19; Karen L. Manos, *Complying with the New Mandatory Disclosure Rule*, Gov't Cont. Costs, Pricing & Acct. Rep., Jan. 2009, at 3–5.

145. FAC 2005-28, 73 Fed. Reg. at 67,065.

146. *See* Allen & Burd, *supra* note 12, at 443 (finding that the mandatory disclosure rule was "ushering in a new paradigm for the public-private relationship that contractors enjoy with their federal customers").

147. *See infra* notes 149–63 and accompanying text.

148. *See* West et al., *supra* note 12, at 2.

149. *See* President's Blue Ribbon Comm'n on Def. Mgmt., A Quest for Excellence: Final Report to the President xxvii (1986) [hereinafter Blue Ribbon Report]. The report stated that public distrust of the contracting process is "deeply disturbing" because "the public is almost

Packard Commission set out to make findings and recommendations concerning the budget process, procurement system, and relationships between Government and industry so as to "assure the integrity of the contracting process."[150]

The Packard Commission believed that government contractors must perform at a "higher level" than their commercial counterparts.[151] Otherwise, the public's lack of confidence in defense contractors could result in a lack of public support for important defense programs.[152] Abandonment or cancellation of such programs would, in turn, negatively impact national security.[153] As a result, the Packard Commission emphasized the importance of the contractor community taking responsibility for reducing and eliminating procurement-related misconduct.

Thus, the Packard Commission recommended that contractors implement corporate self-governance programs.[154] It recommended contractors adopt such practices as writing codes of conduct, training employees regarding their legal and ethical obligations, encouraging employees to report misconduct when it occurs, and instituting internal audit programs to monitor compliance with relevant laws.[155] Most importantly, though, the Commission recommended that the Government establish a program that encouraged contractors to make voluntary disclosures to the Government of procurement-related misconduct.[156] Citing "repeated allegations of fraudulent industry activity," the Packard Commission concluded that "no conceivable number of additional federal auditors, inspectors, investigators, and prosecutors can police [the procurement process] fully. . . ."[157]

certainly mistaken about the extent of corruption in industry and waste in the Department [of Defense]." *Id*. at 77. The President's Blue Ribbon Commission, led by Packard, released its final report on June 30, 1986, three months before Operation Illwind began uncovering corruption on a large scale. *See* Thomas C. Modeszto, *The Department of Defense's Section 845 Authority: An Exception for Prototypes or a Prototype for a Revised Government Procurement System?*, 34 Pub. Cont. L.J. 211, 216 n.16 (2005); *see also Reforming the Pentagon*, L.A. Times, Jan. 23, 1989, at B4 (reporting that the Packard Commission was "appointed during a flood of cases involving the Pentagon's paying of $600 for toilet seats and $900 for cargo-plane coffee pots"). Notably, while the president may have formed the Packard Commission because of spending abuses, the commission found these abuses to be rather infrequent and thus, instead, concentrated on the procurement system and budget process as a whole. *See* Eleanor Clift, *Arms-Buying Czar Proposed; Official Would Control All Military Purchasing*, L.A. Times, Apr. 3, 1986, at A1.

150. *See* Blue Ribbon Report, *supra* note 149, at xi, xiii.

151. *Id*. at 77.

152. *Id*.

153. *Id*.

154. *Id*. at 79; *see also id*. at 80–89 (recommending programs including codes of conduct, internal audits, reporting procedures for misconduct, and ethics training).

155. *Id*. at 78.

156. *Id*. at 110.

157. *See id*. at 75–77 & n.2 (noting further that at the time of the Blue Ribbon Report, there were 131 separate investigations pending against forty-five of the Defense Department's 100 largest contractors).

The DoD accepted the Commission's recommendation and established the Department of Defense Voluntary Disclosure Program in 1986.[158] This program sought to encourage contractors to adopt policies and procedures to voluntarily disclose potential civil or criminal fraud activity that affected their contractual relationship with the Government.[159] Contractors who decided to participate in the program would not receive immunity for their disclosures[160] but could obtain some benefits nonetheless, such as a greater possibility of reduced liability, likely deferment of any suspension from contracting until investigation into the disclosure was complete, coordination of any settlement to ensure inclusion of all government agencies, and the assurance of confidentiality of any information disclosed.[161] The program required contractors that opted to make a disclosure to provide a description of the potential fraud and the contract(s) involved, the military agencies affected by the potential fraud, the estimated financial impact, the time period involved, and any proposed remedy.[162] To qualify for any benefits of the program, the contractor had to prove it was in fact a volunteer and not making the disclosure because of a concern that the Government either had prior knowledge of the potential fraud or was about to initiate its own investigation.[163]

How successful the DoD's voluntary disclosure program was remains the subject of some debate. The Government received more than 470 disclosures and recovered over $462 million between 1986 and 2007.[164] However, most of the money that the Government recovered and most of the disclosures that contractors made occurred during the first ten years of the program.[165] DoJ

158. *See* Letter from William H. Taft IV, Deputy Sec'y of Def., 1 (July 24, 1986) (explaining the reason for the Department's program), *reprinted in* Inspector Gen., U.S. Dep't of Def, The U.S. Dept. of Defense Voluntary Disclosure Program—A Description of the Process app. A (1990) [hereinafter DoD Voluntary Disclosure Program]; *see also* DFARS Supp., Implementation of Recommendations Made by the President's Blue Ribbon Commission on Defense Management, 52 Fed. Reg. 34,386, 34,386 (Sept. 11, 1987) (final rule) (codified in scattered sections of FAR pts. 203, 209, 252) (stating that contractors should "[t]imely report[ ] to appropriate Government officials . . . any suspected or possible violation of law in connection with Government contracts or any other irregularities in connection with such contracts"). For a more detailed overview of the DoD's Voluntary Disclosure Program, see Benjamin B. Klubes, *The Department of Defense Voluntary Disclosure Program*, 19 Pub. Cont. L.J. 504, 511–15 (1990).

159. *See* DoD Voluntary Disclosure Program, *supra* note 158, at 1.

160. *See id*. at Foreword.

161. *See* U.S. Gov't Accountability Office, GAO/NSIAD-96-21, Use and Administration of DoD's Voluntary Disclosure Program 4 (1996).

162. DoD Voluntary Disclosure Program, *supra* note 158, at 6.

163. *See id*.

164. 2007 DoD Inspector Gen. Semiannual Rep. to Congress 101 (2007) [hereinafter DoD IG Report] (reporting on dates of Apr. 1, 2007–Sept. 30, 2007).

165. *See* West et al., *supra* note 12, at 3 (noting that approximately eighty percent of the disclosures made and eighty percent of the $462 million recovered occurred by the close of fiscal year 1997). GAO, citing the DoD Contractor Disclosure Program manager, reported that the DoD Voluntary Disclosure Program "had been largely ignored by contractors for the past 10 years." *See* GAO Ethics Rep., *supra* note 137, at 21. During the first ten years of the program, GAO relayed that disclosures averaged approximately forty to sixty per year; however, in 2007 and 2008, the program received only three and nine disclosures, respectively. *See id*. at 21 & n.27.

specifically noted the drop in voluntary disclosures that the DoD's program had received when it recommended mandatory disclosure.[166] Proponents point out that any decrease in voluntary disclosures could, for example, actually indicate the strength of internal compliance programs and corporate self-governance; thus, voluntary disclosure has been a success.[167] Of course, in the twelve years following Operation Illwind and during the voluntary disclosure era, forty-three of the Government's top federal contractors paid $3.4 billion in fines, penalties, and settlements as a result of procurement improprieties.[168] Surely in at least some of those cases, the contractor decided not to make a voluntary disclosure, despite having information of potential wrongdoing. Regardless of the merits of either side of the debate, the voluntary disclosure program is no longer the primary means by which the Government expects to use the contractor community to detect procurement-related misconduct.[169] Correctly or not, the new primary tool the Government will use to involve contractors in identifying such misconduct is mandatory disclosure.[170]

B. *The Mandatory Disclosure Rule—The First Proposed Rule*

The mandatory disclosure rule came about as a result of the FAR Council's decision to propose new contracting rules that would serve to ensure that contractors conduct themselves with integrity and honesty. The FAR Council believed such rules were necessary due to the fear of an increase in procurement fraud and war profiteering.[171] Thus, in February 2007, the FAR Council determined that contractors with contracts in excess of $5 million and with performance periods longer than 120 days must implement a written code

166. *See infra* notes 176–79 and accompanying text.

167. *See* FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,069 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52) (citing one critic of mandatory disclosure who said that "there may be fewer voluntary disclosures because self-governance is working to prevent and detect [fraud]" such that "[r]eduction in the rate of voluntary disclosures would be an expected byproduct of improved internal processes, enhanced training, better internal controls, and an improved culture of ethics and compliance").

168. *See* Project on Gov't Oversight, Federal Contractor Misconduct: Failures of the Suspension and Debarment System (2002), *available at* http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html (discussing statistics from 1990–2002).

169. As a result of the new mandatory disclosure rule, the DoD replaced its Voluntary Disclosure Program with its Contractor Disclosure Program. *See Contractor Accountability: GAO Report Says Improvements Needed in Oversight of Contractor Ethics Programs*, 92 Fed. Cont. Rep. (BNA) 218, 218 (2009). However, the DoD still encourages voluntary disclosures as part of the Contractor Disclosure Program. *See id.*

170. *See* FAC 2005-28, 73 Fed. Reg. at 67,070 (noting that at least one executive agency inspector general's office has said that "mandatory [disclosure] may be the most effective way for the Government to monitor its vendors").

171. *See* David M. Nadler & Justin Chiarodo, *The Proposed Rule on Contractor Compliance Program and Integrity Reporting—An Ill-Conceived Overreaction to Recent Procurement Scandals*, 49 Gov't Contractor ¶ 474, Dec. 19, 2007, at 3.

of ethics and business conduct.[172] The proposed rule suggested that such a code should include timely reporting of any suspected violations of law to the Government, but the proposed rule did not require contractors to make such disclosures.[173] Accordingly, DoJ responded to the proposed rule by asking the FAR Council to add a requirement that contractors "notify contracting officers without delay whenever they become aware of a contract overpayment or fraud, rather than wait for its discovery by the Government."[174]

DoJ pointed out that self-governance in the banking, security, and health care industries all required mandatory disclosure to the Government of violations of relevant laws, and therefore asserted that the Government should hold contractors to the same standards.[175] Moreover, DoJ emphasized that few contractors had participated in the DoD's voluntary disclosure program.[176] Citing five disclosures made in calendar year 2006 and two disclosures in calendar year 2007, DoJ noted its caseload suggested far more procurement-related misconduct was occurring than contractors were willing to admit themselves;[177] hence DoJ's "unprecedented request to add a new section entitled 'Contractor Integrity Reporting' to the FAR."[178] According to DoJ, requiring mandatory disclosure "would serve to emphasize the critical importance of integrity in contracting."[179]

DoJ thus recommended that the FAR Council include language in its proposed rule requiring contractors to

> notify the contracting officer in writing whenever the contractor has reasonable grounds to believe an officer, director, employee, agent, or subcontractor of the contractor may have committed a violation of federal criminal law in connection with the award or performance of any government contract or subcontract.[180]

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172. *See* FAR Case 2007-006, Contractor Code of Ethics and Business Conduct, 72 Fed. Reg. 7588, 7590 (proposed Feb. 16, 2007) [hereinafter Proposed FAR Rule on Code of Ethics & Bus. Conduct] (to be codified at FAR pts. 2, 3, 52). For more information on the ethics compliance code promulgated by the FAR Council, see generally Kathuria, *supra* note 7, at 821–22.

173. *See* Proposed FAR Rule on Code of Ethics & Bus. Conduct, 72 Fed. Reg. at 7590.

174. *See* Fisher Letter, *supra* note 142, app. D-1.

175. *See id*.

176. *See* FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64,019, 64,020 (proposed Nov. 14, 2007) [hereinafter Proposed FAR Rule on Compliance Program & Integrity Reporting] (to be codified at FAR pts. 3, 9, 42, 52).

177. *See* FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,070 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52) (stating that "there are still significant numbers of violations occurring and being prosecuted that have not been self-disclosed"). Interestingly, DoJ received at least one referral from the Court of Federal Claims. In *Naplesyacht.com, Inc. v. United States*, Judge Braden denied Naplesyacht.com's bid protest alleging that the Navy had improperly evaluated its proposal. 60 Fed. Cl. 459, 462 (2004). However, she also expressed concern over whether one of Naplesyacht.com's competitors "had pre-bid knowledge" of its proposal, and accordingly provided a copy of its order denying the protest to "the Antitrust Division of the Department of Justice . . . for a preliminary action and such further action as it may deem appropriate." *Id*. at 472 n.9.

178. Angela B. Styles, *The Department of Justice's Call for Integrity: Will Federal Contractors Answer?*, 89 Fed. Cont. Rep. (BNA) 136, 136–37 (2008).

179. *See* Fisher Letter, *supra* note 142, app. D-1.

180. *Id*. app. D-3.

The FAR Council responded favorably to DoJ's request. The FAR Council modified its proposed rule and required contractors to notify the affected agency's inspector general and Contracting Officer "whenever the contractor has reasonable grounds to believe that a violation of criminal law has been committed in connection with the award or performance of the contract or any subcontract thereunder."[181] As this broad language demonstrates, this proposed mandatory disclosure rule would have included the PIA, since that federal statute contains criminal penalties for certain violations. However, this broad language also triggered significant objections from the contracting community and resulted in a change that now almost certainly excludes the PIA.

C. *The Mandatory Disclosure Rule—The Final Rule*

The public comments to the proposed mandatory disclosure rule raised a number of concerns. These concerns included, among others, infringement on attorney-client confidentiality, the lack of a showing that voluntary disclosure was insufficient, the meaning of "reasonable grounds," and vagueness as to what criminal law violations required disclosure.[182] As for the concern about vagueness, some of the public's comments argued that the proposed mandatory disclosure rule was problematic because it included nonprocurement offenses.[183] The FAR Council questioned the propriety of such a situation, especially given that the affected agency's inspector general would not have jurisdiction over such offenses.[184] DoJ agreed that the language of the proposed rule was too broad, and therefore recommended limiting the rule's reach to crimes involving fraud, conflict of interest, bribery, or gratuity in violation of Title 18 of the U.S. Code.[185]

Accordingly, the FAR Council amended the mandatory disclosure rule to read as it does today. And the language of the rule does not require disclosure of PIA violations. As a statute lodged in Title 41 of the U.S. Code, the PIA is not a Title 18 statute and therefore not within the scope of the mandatory disclosure rule. Indeed, the American Bar Association Section of Public Contract Law apparently has recognized this fact. Noting that the mandatory disclosure rule expressly requires reports of violations of Title 18, the Section of Public Contract Law explicitly cited the PIA as one statute that,

181. Proposed FAR Rule on Compliance Program & Integrity Reporting, 72 Fed. Reg. at 64,020.

182. *See, e.g.*, *ABA MDR Guide*, *supra* note 7, at 24; West et al., *supra* note 12, at 6–7. *See generally* FAC 2005-28, 73 Fed. Reg. 67,064.

183. *See* FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,075 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52) (noting the possibilities of OSHA, tax, and traffic offenses occurring while performing a government contract qualified as reportable offenses).

184. *See id*.

185. *See ABA MDR Guide*, *supra* note 7, at 23 (noting that DoJ also recommended amending the rule to include mandatory disclosure of overpayments and violations of the Civil False Claims Act).

notwithstanding its importance to government contractors, is not a Title 18 statute and, therefore, not within the definition of criminal conduct set out in the rule.[186] Despite this fact, some within the procurement community may nevertheless contend that contractors still must report PIA violations to the Government.[187] In the end, such an argument must fail.

D. *A Loophole Still Exists*

When the FAR Council published the first version of the mandatory disclosure rule, the rule applied only to contracts performed within the United States.[188] Congressman Peter Welch asserted that a mandatory disclosure rule, applicable only to contracts performed within the United States despite the many contracts being performed outside the United States, created a "loophole . . . so outrageous that once exposed in the light of day it was simply indefensible. . . . We need to protect taxpayer dollars and our troops serving overseas by closing this loophole with the force of law."[189] Therefore, on June 30, 2008, Congress passed the Close the Contractor Fraud Loophole Act, which required the FAR Council to amend the FAR to include provisions that required "timely notification by federal contractors of violations of federal criminal law," and applied regardless of where the contract was to be performed.[190]

However, a loophole still exists. Despite applying to procurement-related misconduct, the mandatory disclosure rule does not include the procurement-specific Procurement Integrity Act. It seems intuitive that this particular statute should be included in a rule requiring disclosure of violations of law in connection with a procurement. Ironically, then, in attempting to comply with the congressional mandate to close one loophole, the FAR Council created another one. Contractors not wishing to disclose their PIA violations do not appear to have an obligation to do so. Indeed, basic statutory interpretation principles support such a conclusion.[191]

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186. *See id*. at 44–45 (recognizing the PIA, the Foreign Corrupt Practices Act, the Arms Export Control Act, the Trade Agreements Act, and the Buy American Act as examples of statutes of "particular relevance to Government contractors" that are not in Title 18 "and therefore outside the express definition of criminal conduct warranting mandatory disclosure").

187. *See* Louis D. Victorino & John W. Chierichella, *The FAR's "Contractor Business Ethics Compliance Program and Disclosure Requirements" Require Significant Changes for All Government Contractors and Subcontractors*, 50 Gov't Contractor ¶ 439, Dec. 17, 2008, at 6 (arguing that the mandatory disclosure rule "practically requires" a contractor to conduct an internal investigation if it suspects its personnel have committed any misconduct in connection with a procurement).

188. *See* Proposed FAR Rule on Compliance Program & Integrity Reporting, 72 Fed. Reg. 64,019, 64,020 (proposed Nov. 14, 2007) (to be codified at FAR pts. 3, 9, 42, 52) (noting that the PIA will apply to all government contracts).

189. *Welch Contractor Fraud Bill Passes House*, Congressman Peter Welch (Apr. 22, 2008), http://www.welch.house.gov/index.php?option=com_content&task=view&id=293.

190. Close the Contractor Fraud Loophole Act, Pub. L. No. 110-252, § 6101, 122 Stat. 2323, 2386 (2008) (codified at 41 U.S.C. § 251).

191. *See* Silverman v. Eastrich Multiple Investor Fund, LP, 51 F.3d 28, 31 (3d Cir. 1995) (explaining that "tenet[s] of statutory construction [are] equally applicable to regulatory construction").

First, the plain language of the mandatory disclosure rule does not require a contractor to report its PIA violations. As discussed previously, the rule applies to only Title 18 offenses, which a PIA violation is not. Thus, because the rule's language is clear and unambiguous that only Title 18 violations must be disclosed, a contractor that discovers that it has committed a PIA violation need not disclose that violation.[192]

Second, notwithstanding the purpose of the mandatory disclosure rule, the language of the rule does not support that purpose insofar as the PIA is concerned. It is often noted that rules and statutes should be construed to effectuate the drafter's "overriding purpose."[193] The purpose of the mandatory disclosure rule is to require disclosure of criminal conduct in connection with the award, performance, or closeout of a government contract.[194] Thus, some may contend that contractors must disclose their PIA violations since such violations occur only in connection with the award of a government contract. But arguing the purpose of a rule as indicative of the rule's meaning is compelling only if the rule's language is consistent with that purpose.[195] The plain language of the mandatory disclosure rule is not consistent with a purpose to require disclosure of criminal violations in connection with a procurement. To the contrary, the plain language communicates a purpose that contractors must disclose only Title 18 violations. Thus, as currently written, violations most likely requiring disclosure include false, fictitious, or fraudulent claims; major fraud against the United States; compensation to members of Congress, officers, and others in matters affecting the Government; activities of officers and employees in claims against and other matters affecting the Government; restrictions on former officers, employees, and elected officials of the executive and legislative branches; acts affecting a personal financial interest; bribery; and gratuities.[196]

Finally, the FAR Council's change of the original mandatory disclosure rule to its current form by adding the limiting language to Title 18 offenses is significant. As the first mandatory disclosure rule that the FAR Council proposed required disclosure of any criminal law in connection with a government contract, that language would have required disclosure of PIA criminal violations. The final rule that limited disclosure to only Title 18 offenses,

192. *See* Dodd v. United States, 545 U.S. 353, 359 (2005) (stating that "'when [a] statute's language is plain, the sole function . . . is to enforce it according to its terms'" (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, NA, 530 U.S. 353, 359 (2000))); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (instructing that the plain language of a statute "must ordinarily be regarded as conclusive").

193. *See*, *e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 458 (2002).

194. *See ABA MDR Guide*, *supra* note 7, at 45.

195. *Cf.* United States v. Union Oil Co., 343 F.2d 29, 33 (9th Cir. 1965) (explaining that in order for the purpose of a statute to govern its meaning, the language of the statute must bear that interpretation "in order to overcome the obvious force of a normal reading of the disputed provision").

196. *See* Manos, *supra* note 144, at 4 (citing 18 U.S.C. §§ 201(b)–(c), 203, 205, 207, 208, 287, 1031).

however, clearly changed a contractor's disclosure obligations. Even though it is titled "Crimes and Criminal Procedure," Title 18 does not contain every federal criminal law statute. In fact, a vast majority of federal criminal laws are not even in Title 18. A 2003 Federalist Society study noted that there are more than 4,000 federal crimes, with approximately 1,200 found in Title 18 and the remaining 2,800 "scattered throughout the remaining 49 titles of the United States Code."[197] By limiting the mandatory disclosure rule to Title 18 offenses, the FAR Council precluded the rule's application to other "criminal" laws. When the final version of a rule deletes language from an earlier draft, rules of statutory construction treat such a deletion as intentional.[198]

Thus, it does not appear that a convincing argument exists that the mandatory disclosure rule already requires disclosure of PIA violations. While many contractors may decide nonetheless to report such violations out of an abundance of caution to help establish, improve, or maintain its business relationship with the Government, arguably others will not disclose their PIA violations if a reason to not disclose exists. The language of the rule provides such a reason. In the absence of a clear requirement for disclosure, other contractors are likely to err on the side of nondisclosure when it comes to the PIA. So, although "[n]ondisclosure of a known criminal violation . . . may be unwise . . ., even where the violation is not expressly included in the FAR's mandatory disclosure rule,"[199] "[m]ore inclusive language removes any ambiguity (and loopholes) about what should be revealed to the Government."[200]

In the end, the FAR Council promulgated a rule designed to require disclosure of misconduct occurring in connection with a procurement. Debates may rage as to precisely what misconduct truly requires disclosure. However, as far as the PIA is concerned, there should be no debate. It is a procurement-centric statute that if violated is violated only in connection with a procurement. The mandatory disclosure rule therefore contains a loophole. The FAR Council should close it.

V. FOUR REASONS TO INCLUDE THE PROCUREMENT INTEGRITY ACT IN THE MANDATORY DISCLOSURE RULE

Contractors may object to adding the PIA to the mandatory disclosure rule, and for good reason. First, they may argue it is unnecessary because the procurement system already provides for adequate means of learning about PIA violations. Contractors may voluntarily disclose PIA violations under

197. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 648–49 (2006).

198. *See In re* Town & Country Home Nursing Servs., Inc., 963 F.2d 1146, 1151 (9th Cir. 1992).

199. ABA MDR *Guide*, *supra* note 7, at 45.

200. FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,085 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52).

voluntary disclosure programs. Moreover, the PIA itself uniquely encourages contractors to report their competitor's PIA violations in order to preserve protest rights[201]—no other procurement statute or rule appears to have a similar requirement. A second reason why it may be unwise to add the PIA to the mandatory disclosure rule is the cost. Contractors will incur significant costs as a result of a rule that requires disclosure of PIA violations in detecting and substantiating those violations, as well as costs associated with ensuring such violations do not occur in the first place through training and compliance programs. They must implement such training and programs, and these training and programs become more expensive with the more subject matter they must cover. Contractors, however, will inevitably pass those costs onto the Government in their proposals for future government contracts; these costs will ultimately be borne by the taxpayer.

Nevertheless, compelling reasons militate in favor of adding the PIA to the mandatory disclosure rule. On balance, these reasons appear to outweigh reasons against doing so. Even the Section of Public Contract Law of the American Bar Association has observed that the PIA is one statute that has special significance to contractors, yet does not appear to be a part of the mandatory disclosure rule.[202] At least four reasons support adding the PIA to the mandatory disclosure rule. First, adding the PIA to the mandatory disclosure rule will lead to the discovery of more violations. Second, it will enhance the deterrent effect of the PIA. Third, the PIA logically complements the statutes listed in the mandatory disclosure rule. And fourth, the PIA and the mandatory disclosure rule share the same purpose of promoting procurement integrity.

A. *Detecting Procurement Integrity Act Violations*

The PIA does not exist to discover violations. So, notwithstanding the PIA's impressive array of enforcement mechanisms, the enforcement mechanisms do "not provide evidence to prosecute fraud suspects."[203] Regardless of the number of criminal prosecutions, civil suits, bid protests, suspensions and debarments, rescinded contracts, and agency investigations that have occurred as a result of the PIA, they likely do not reflect every instance of PIA violations. Rather, most would agree that more misconduct occurs than is discovered.[204] Thus, the most obvious result of adding the PIA to the mandatory disclosure rule will be to close that gap and to allow the discovery of more violations.

The need to discover PIA violations may be more important now than ever before. Indeed, some observers have predicted that PIA violations may be on the rise.[205] The main reason for this prediction is the significant sums

201. *See* 41 U.S.C. § 423(g) (2006).
202. *See ABA MDR Guide*, *supra* note 7, at 44.
203. Donaldson, *supra* note 26, at 445.
204. *See* Kathuria, *supra* note 7, at 805.
205. *See*, *e.g.*, Frederic M. Levy & Christopher C. Bouquet, *Back to the Future: Trends in Procurement Frauds Investigations*, Metropolitan Corp. Couns., Apr. 2005, at 6 (stating that

the Government spends on procurement. In fiscal year 2008 alone, the U.S. government spent $527 billion on contracts.[206] That is enough money to give every person in the world approximately $78.[207] It is enough money to fund a four-year college education at a public university for 18,767,806 Americans.[208] And it is more than enough to buy 6,773,778 2010 Porsche 911 Carreras—or about one such car for every 45 Americans.[209] Not surprisingly, the DoD inspector general recently reported to Congress that the DoD's massive budget has made it more vulnerable to procurement irregularities[210] such as PIA violations. Sadly, there are government employees and contractor personnel willing to risk exchanging sensitive procurement information or engaging in impermissible employment negotiations in order to obtain some of the billions of dollars involved with government contracting.

Identifying when that disclosure or receipt occurs may be quite difficult, however. By its very nature, a PIA violation is clandestine. Absent a whistleblower or other eyewitness, the Government or a competing contractor may never find out about exchanges of sensitive procurement information. A significant bank deposit around the time offers are due, an otherwise inexplicable change in a bid or proposal price following the submission of an initial offer, or amendments to an offer that precisely match an evaluation board's determination could raise suspicions, but do not directly demonstrate a PIA violation. Sometimes investigators may be relegated to comparing proposals side-by-side to find similarities that can only be explained by one contractor having prepared its proposal with the benefit of the other's information.[211] Recall that in *United States v. Parrish*, the Government could show that defendant Carlisle had cut and pasted AMS's proposal information by pointing out both contained the same typographical errors.[212] Such cases would seem rare, however. Alternatively, with the benefit of technology, an aggrieved contractor could show through metadata or other forensic information technology

"[i]n our view, in the coming wave of procurement fraud investigations contractors face greatest risk of prosecution for . . . violation of the Procurement Integrity Act.").

206. *See Total Spending by Year*, FedSpending.org, http://www.fedspending.org/fpds/chart_total.php (last visited Oct. 19, 2010).

207. U.S. Census Bureau, http://www.census.gov/ (last visited Oct. 19, 2010) (calculation based on world population estimated at 6,807,679,886).

208. *See What It Costs to Go to College*, Coll. Bd., http://www.collegeboard.com/student/pay/add-it-up/4494.html (last visited Oct. 19, 2010) (estimating public university tuition to be $7,020 per year).

209. *See All 911 Models*, Porsche, http://www.porsche.com/usa/models/911/911-carrera (last visited Oct. 19, 2010) (estimating price for a 2010 911 Carrera to be $77,800); U.S. Census Bureau, *supra* note 207.

210. Inspector Gen., U.S. Dep't of Def., Dep't of Defense Inspector General Growth Plan for Increasing Audit and Investigative Capabilities Fiscal Years 2008–2015, at 5 (2008).

211. *See* Steven W. Feldman, *Traversing the Tightrope Between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Leveling, and Auction Techniques*, 17 Pub. Cont. L.J. 211, 229 (1987).

212. *See supra* notes 60–70 and accompanying text.

how a competitor obtained its proprietary data. But even then, the chances of successfully showing the illicit activity may still be low.[213] As technology improves, government spending increases, and more money is at stake, the less scrupulous will find new and different ways to engage in the exchange of confidential procurement information. A tool such as mandatory disclosure would help the Government identify when those exchanges occur.

In addition to the clandestine nature of PIA violations, the Government may lack the necessary resources to detect violations when they occur. No one would dispute the notion that the lack of manpower, for example, poses a significant challenge for the Government in detecting procurement misconduct such as PIA violations. Indeed, the investigative force is not what it once was. Although the DoD Criminal Investigative Service's workforce has remained constant between 313 and 385 personnel during the past thirteen years, the staff in 1993 had substantially fewer contracts to look into, with significantly less money at stake.[214]

Similarly, the acquisition workforce has not kept pace with the increase in contracting. GAO recently reported that the Federal Government's acquisition workforce has not increased since fiscal year 2000, but the number of contracts and their value have increased nearly twofold.[215] This fact is important, if for no other reason than contracting personnel are in the best position to detect and report potentially fraudulent conduct.[216] Without a fully capable acquisition workforce, the Government will not be able to adequately prevent misconduct throughout the procurement system.[217]

Statistics seem to confirm the fear that current resources are inadequate to identify procurement-related misconduct. Between 1993 and 2008, DoD referrals of procurement misconduct cases decreased by seventy-six percent,

213. *See* Feldman, *supra* note 211, at 212.

214. Schwellenbach, *supra* note 57 (noting further that the FBI had referred 213 Defense Department procurement fraud matters to the Department of Justice for prosecution in 2001, but only 86 in 2008).

215. *See* U.S. Gov't Accountability Office, GAO-06-838R, Contract Management: DOD Vulnerabilities to Contracting Fraud, Waste, and Abuse 7–8 (2006) (noting a thirty-eight percent decrease in the federal acquisition workforce from the mid-1990s to 2001); *see also* Schooner, *supra* note 114, at 651, 672 (writing that "the data suggests that Congress' relentless campaign to reduce the size of the acquisition workforce has unduly burdened, over-extended, and exhausted the government's buyers" and that there is a "trend toward continued downsizing of the acquisition workforce"); Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 2, 19 (2007) [hereinafter Acquisition Advisory Panel Report] (concluding that the acquisition workforce has remained stable since 2000 despite a seventy-five percent increase in government purchasing); Steven L. Schooner, *Keeping Up with Procurement*, Gov't Executive, July 1, 2006, at 74, *available at* http://www.govexec.com/features/0706-01/0706-01advp.htm (writing that "it should be obvious that the federal government lacks a sufficient acquisition workforce to obtain the best value for the money it spends").

216. Vincent Buonocore, *Implementing a Procurement Fraud Program: Keeping the Contractors Honest*, Army Law., June 1987, at 14–15.

217. *See generally* U.S. Gov't Accountability Office, GAO-07-1098T, Federal Acquisitions and Contracting: Systemic Challenges Need Attention (2007).

while the FBI's number of referrals for government-wide corruption matters, including procurement fraud, declined by fifty-five percent.[218] These statistics are alarming, especially since the number of procurements and the federal expenditures on those procurements have increased dramatically over the same time period.[219]

The PIA cannot effectively "punish illegal activities swiftly,"[220] when and if they do occur, without evidence of those illegal activities. The mandatory disclosure rule can assist law enforcement and government agencies by "enhanc[ing] [the] ability to detect" those illegal activities.[221] This potential benefit seems necessary. Rapid, full disclosure is essential. In addition, contractors should bear some responsibility for rooting out procurement misconduct such as PIA violations if they want to benefit from potentially lucrative government contracts.

B. *Enhancing the Procurement Integrity Act's Deterrent Effect*

Requiring contractors to report their violations of the PIA will also enhance the statute's deterrent effect. Regardless of any weaknesses with the PIA's criminal penalties,[222] the PIA provides for significant civil and administrative penalties as well. The penalties alone may serve to encourage contractors to act ethically. And the risk of suspension and debarment under the mandatory disclosure rule for failing to report a PIA violation would only strengthen the PIA's other penalties. No statute will prevent every individual from committing the evil that the statute targets merely because of the possibility of significant adverse consequences. But requiring a contractor to risk suspension and debarment for failing to report a PIA violation should provide a significant motivation for contractors to develop a culture of compliance, and to identify rogue employees willing to break the law. The mandatory disclosure rule "practically requires" a company to conduct an internal investigation if it suspects its personnel has committed any misconduct in connection with a procurement.[223] To minimize the expense and inconvenience of such internal investigations, contractors may be more vigilant in preventing violations from occurring in the first place if a rule required disclosure of PIA violations.

Suspension or debarment is a significant penalty and can be the death knell for a contractor that depends on government contracts for its livelihood. This

218. Schwellenbach, *supra* note 57.

219. *See Trending Analysis Report Since Fiscal Year 2003*, Fed. Procurement Data Sys.-Next Generation, http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls (showing increase in federal contracting dollars each year, from $326 billion in 2003 to $537 billion in 2008).

220. 134 Cong. Rec. 32,156 (1988) (statement of Sen. Glenn).

221. FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,071 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52).

222. *See supra* notes 107–10 and accompanying text.

223. Victorino & Chierichella, *supra* note 187, at 6.

is not to say that contractors will willingly develop the systems and programs it needs to in order to detect PIA violations.[224] However, making PIA violations subject to mandatory disclosure, and threatening suspension or debarment if no disclosure is made, should tip the balance in favor of integrity. Mandatory disclosure will increase costs, but those "costs should be preferable . . . to the potential alternatives of investigation, suspension from contracting, civil penalties, and prosecution."[225]

C. *The Procurement Integrity Act Complements Currently Listed Statutes*

A third reason for including the PIA in the mandatory disclosure rule is because it appears to be a natural and logical complement to a number of the statutes that the rule already lists. The PIA captures misconduct, though, not covered by the statutes already listed in the mandatory disclosure rule. At the very least, the PIA may provide a clearer and more comprehensive definition of prohibited conduct than the currently listed statutes. Such clarity will assist contractors as they attempt to comply with the mandatory disclosure rule.

1. 18 U.S.C. § 201

The PIA ably complements the antibribery statute, which is already referenced in the mandatory disclosure rule. Title 18 U.S.C. § 201 prohibits an individual from giving, and a public official from seeking, "anything of value" in exchange for the performance of an official act or as a result of an official act.[226]

The bribery statute does not, of course, capture some of the most destructive behavior. While the exchange of confidential information often occurs for something of value, sometimes the evidence may not show that money was involved. For example, neither *United States v. Lessner* nor *United States v. Honbo*, discussed above, suggested that the defendants disclosed sensitive procurement information for money. On the contrary, those cases indicated that personal relationships were the motivating cause. And it is doubtful that *Lessner* and *Honbo* are aberrations. In cases like these, then, if the firm could not find any "credible evidence" of an exchange of something of value, the bribery statute would not apply and no disclosure would occur. The PIA, however, would apply even in the absence of evidence of money changing hands.

224. Eric Feldman, the co-chairman of the Private Sector Outreach Committee of the Task Force and the senior advisor to the director of the National Reconnaissance Office for Procurement Integrity, has asserted that many large contractors have established internal control programs that "place[] form over substance and the spirit in which these programs were originally intended" such that they "may be 'paper tigers' that operate without the benefit of adequate numbers of trained, experienced personnel conducting internal investigations and training the workforce." Cracking Down, *supra* note 10, at 13.

225. *See* Kathuria, *supra* note 7, at 814.

226. *See generally* 18 U.S.C. § 201(a)–(b) (2006); United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978) (distinguishing bribery and graft).

2. 18 U.S.C. §§ 207 and 208

Title 18 U.S.C. §§ 207 and 208 contain revolving door provisions not unlike those in PIA. Section 207 limits a former government employee from working on matters on which the employee participated "personally and substantially" while with the Government.[227] Section 208 bars a government employee from acting personally and substantially on matters that may affect the employee's or a relative's financial interests.[228] These two statutes, then, cover much of the same conduct that the PIA addresses. In fact, Professors Nash and Cibinic once took issue with the "considerable overlap" between the PIA and sections 207 and 208.[229] They would have "preferred total omission of these 'revolving door' rules from the new [PIA]—leaving the area governed by the criminal statutes [sections 207 and 208]."[230]

Although it targets very similar bad acts, the PIA fills in many gaps left open by sections 207 and 208. First, it covers more employees.[231] Second, it "goes much further in many of these [post-government employment] areas both to define violations and to outline civil and criminal penalties for them."[232] As one commentator has said, "protective measures are addressed

227. 18 U.S.C. § 207(a)–(b) bars former federal executive branch officers and employees, acting on behalf of any party other than the United States, from (1) permanently influencing matters "in which the United States . . . is a party or has a direct and substantial interest . . . [and the employee] participated personally and substantially . . . [and] which involved a specific party or specific parties at the time of such participation" and from (2) attempting to influence officers or employees of any agency for two years from the termination of their Government employment. Title 18 U.S.C. § 207(b) further provides that former federal executive and legislative branch officers, employees, and elected officials who "personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period [before their Government employment] terminated" must refrain for one year after the termination of such employment from providing advice or aid to "any other person (except the United States) concerning such ongoing trade or treaty negotiation."

228. Title 18 U.S.C. § 208(a) prohibits executive branch officers and employees from participating "personally and substantially . . . through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest."

229. Nash & Cibinic, *supra* note 124, at 40.

230. *Id*.

231. Title 18, for example, does not cover enlisted service members, whereas the PIA would. *Compare* Allen B. Coe, *18 U.S.C. § 207(a)(1) "Lifetime Representation Ban" Opinions: A Lifetime's Work for Agency Ethics Officials and Advisors*, 63 A.F. L. Rev. 129, 158 (2009) (explaining of the term "officers" in 18 U.S.C. § 207 precludes application to enlisted members), *with* Major Kathryn Stone, *The Twilight Zone: Postgovernment Employment Restrictions Affecting Retired and Former Department of Defense Personnel*, 142 Mil. L. Rev. 67, 113 (1994) ("[Section] 423(f) currently applies to enlisted members of the uniformed services, while § 207 does not"); *see also* Keith R. Szeliga, *Watch Your Step: A Contractor's Guide to Revolving-Door Restrictions*, 36 Pub. Cont. L.J. 519, 524 (2007) ("Enlisted members of the Armed Forces are excluded from the coverage of sections 207 and 208.").

232. James S. Roberts, *The "Revolving Door": Issues Related to the Hiring of Former Federal Government Employees*, 43 Ala. L. Rev. 343, 371 (1992).

much more directly in the [PIA] than in 18 U.S.C. § 208, which is rather vague in comparison."[233] And finally, the PIA offers a harsher civil penalty.[234] Even though the PIA's revolving door provisions do not provide for criminal penalties, it can still apply in situations where sections 207 and 208 might not. As a result, including sections 207 and 208 in the mandatory disclosure rule and not the PIA makes little sense.

The revolving door issue is not likely to subside anytime soon. A recent report noted that the "imbalance between supply and demand is exacerbated by the strong competition that the private sector offers the Government in trying to recruit the shrinking pool of talented procurement professionals. The Government is losing this competition."[235] This imbalance in the marketplace—and pressure for public servants to flee to the private sector—increases the opportunities for trading inside information. The mandatory disclosure rule would benefit, therefore, from including all relevant statutes dealing with the revolving door. The PIA is such a statute.

3. 18 U.S.C. § 641

The PIA may complement the criminal conversion statute, 18 U.S.C. § 641, as well. Section 641 prohibits selling, conveying, or disposing of "any record, voucher, money, or thing of value of the United States."[236] DoJ used section 641 to convict many defendants identified during Operation Illwind who had exchanged confidential procurement information.[237] Yet, section 641 suffers from at least two potential weaknesses that the PIA may be able to overcome.

First, while section 641 may cover government-produced confidential procurement information, i.e., source selection information, it may not cover a contractor's bid or proposal information. Only one district court has expressly

233. Jeffrey Branstetter, *Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 Pub. Cont. L.J. 443, 458 (2005). Congress considered eliminating the PIA's conflict of interest provisions in 1990 during the suspension of the PIA, noting the Act (and other statutes) were "duplicative in purpose of the general conflict of interest statutes, 18 U.S.C. §§ 201, 207, and 208." 136 Cong. Rec. 15,199 (1990). But Congress ultimately rejected making this change.

234. *Compare* 18 U.S.C. § 216(b) (2006) (providing civil penalty for violation of sections 207 and 208 as "not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater"), *with* 41 U.S.C. § 423(e)(2) (2006) (providing a civil penalty of "not more than $50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct").

235. Acquisition Advisory Panel Report, *supra* note 215, at 363.

236. 18 U.S.C. § 641 (2006).

237. When deliberating the need for the PIA, Congress recognized that "the Justice Department [was] successful in obtaining convictions using statutes such as the . . . conversion statute[] that ha[s] long been on the books." 136 Cong. Rec. 15,201 (1990). The Fourth Circuit, in a case involving section 641, noted that as a result of the defendant having obtained bid and source selection information, "[t]he conduct giving rise to the convictions occurred prior to the passage of [the Procurement Integrity Act]." United States v. McAusland, 979 F.2d 970, 972 & n.1 (4th Cir. 1992). The Fourth Circuit, of course, was the situs for most of the prosecutions brought about as a result of Operation Illwind.

held that the statute does cover privately generated information.[238] In *United States v. Berlin*, the district court observed that previous section 641 convictions had all resulted from theft of "information that was generated by the government."[239] The district court conceded that "there have been no cases involving information generated by a private party and submitted to the government temporarily."[240] Nevertheless, the court found that section 641 covered such information, relying on a case that upheld a section 641 conviction for theft of tangible personal property from the temporary custody of the Government.[241]

Section 641's language, however, suggests it would not apply to a contractor's bid or proposal information, as it applies only to "any record, voucher, money, or thing of value *of the United States*."[242] It would seem that a contractor's confidential information—that which it develops and proposes for the United States' consideration—is not "of the United States," but rather of the contractor. Other circuits have used language that appears to contradict the district court's reading of section 641. In *United States v. Gordon*, for example, the Fifth Circuit found that the "word 'of' necessarily implies ownership. Things 'of' the Government, in the sense of [section 641], are property of the Government."[243] Moreover, the very title of the statute suggests the United States owns the property: Public money, property, or records.[244] Public property and public records likely do not include property and records created and owned by a private contractor, even if possessed by the Government. Additionally, even those courts that have suggested section 641 does not require absolute ownership, they nevertheless find that the Government must exercise virtually complete control over the property for section 641 to apply,[245] a fact that might not necessarily be true with respect to a contractor's bid information. Thus, depending on the facts, a contractor that has wrongfully come into possession of another's bid or proposal information may be unsure whether it has violated section 641, and may thus question whether it needs to disclose the possible violation. Moreover, those contractors looking for a reason to avoid having to make a mandatory disclosure could seek to interpret section 641 in a way that does not favor disclosure.

238. *See* United States v. Matzkin, 14 F.3d 1014, 1018–20 (4th Cir. 1994) (rejecting the argument that competitor's bid pricing information was the property of the competitor and thus not subject to prosecution under 18 U.S.C. § 641).

239. 707 F. Supp. 832, 839 (E.D. Va. 1989).

240. *Id.*

241. *Id.* at 839–40.

242. 18 U.S.C. § 641 (2006) (emphasis added).

243. 638 F.2d 886, 889 (5th Cir. 1981).

244. Should the issue come down to an ambiguity in the statute's language, a court will read the "'section heading and the section's content to come up with the statute's clear and total meaning.'" United States v. Holmes, 822 F.2d 481, 494 n.22 (5th Cir. 1987) (quoting House v. Comm'r, 453 F.2d 982, 987 (5th Cir. 1972)).

245. *See, e.g.*, United States v. Tana, 618 F. Supp. 1393, 1395 (S.D.N.Y. 1985) (quoting United States v. McIntosh, 655 F.2d 80, 84 (5th Cir. 1981) (stating that the greater the control, the more likely the courts are to find a violation of section 641).

The second possible weakness with section 641 is that a conflict exists among the federal courts as to whether the Government must prove that an accused had knowledge that the property he embezzled, stole, purloined, or knowingly converted to his own use or to the use of another was property owned by the United States.[246] In a jurisdiction that required such proof, the evidence to support such a finding might be lacking, and a contractor could potentially avoid mandatory disclosure.

With the PIA, however, these issues are irrelevant. The PIA covers specified proposal information submitted by a contractor and does not require knowledge of ownership. Thus, although section 641 may apply to many situations involving the misuse of confidential procurement information, the PIA generally provides a clearer definition for contractors to apply. As a more precise statute, the PIA may eliminate confusion and uncertainty as to whether a disclosure must be made and thus provide a useful complement to Title 18's conversion statute.

4. 18 U.S.C. § 1905

Another statute dealing with confidential procurement information that the PIA may complement is the Trade Secrets Act. The Trade Secrets Act prohibits the release of "trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association."[247] The PIA complements the Trade Secrets Act in that the PIA applies in situations where the Trade Secrets Act might not and also covers additional confidential information that the Trade Secrets Act does not.

First, the Trade Secrets Act expressly applies to government personnel only.[248] As such, a contractor might not have to report situations where its employee receives protected information. Indeed, the mandatory disclosure rule does not discuss accomplice liability. So, a violation of the Trade Secrets Act may not be a reportable offense where a government employee inadvertently discloses confidential procurement information to a contractor employee who nonetheless appropriates it to his advantage.[249] Such a situation would

246. *See* Ethel R. Alston, Annotation, *Necessity to Support Conviction of Proving Under 18 U.S.C.A. § 641, That Defendant Knew That Property That He Embezzled, Stole, Purloined, or Knowingly Converted to His Use or to the Use of Another Was Property Owned by the United States*, 38 A.L.R. Fed. 421 (2009); *cf.* United States v. Hall, 549 F.3d 1033, 1038 (6th Cir. 2008) (requiring Government to prove the defendant knew the property was something of value of the United States).

247. 18 U.S.C. § 1905 (2006).

248. *See id.*; *see also* St. Mary's Hosp., Inc. v. Califano, 462 F. Supp. 315, 318 (S.D. Fla. 1978) (explaining that "18 U.S.C. § 1905 is a criminal statute designed solely to prevent government employees from surreptitiously divulging privileged information").

249. *See, e.g.*, *infra* note 256 (discussing an actual case involving a government employee's inadvertent transmission of sensitive procurement information to a contractor who allegedly used it to his firm's advantage).

not prevent use of the PIA, and so a contractor that discovered it had obtained and appropriated Trade Secrets Act information would have to disclose that conduct because of the PIA.

Second, the Trade Secrets Act does not protect the information not specifically listed in it.[250] As such, a contractor could avoid mandatory disclosure if the wrongfully used information did not qualify as "trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association." It is therefore likely that the Trade Secrets Act does not cover the bid pricing information exchanged in the *Olson*, *Ferrell*, *Parrish*, and *Lessner* cases discussed above, nor the board evaluation information traded in *Honbo*.[251] As previously discussed, the PIA covers a much more specific and precise list of protected material and likely affords more flexibility. It would therefore apply where the Trade Secrets Act would not, and apply in situations where the Government undoubtedly would want mandatory disclosure.

5. 18 U.S.C. § 371

Finally, in addressing the fact that the mandatory disclosure rule may not apply to violations of the PIA because it is not a part of Title 18, the American Bar Association points out that nonetheless, an "act made unlawful by statutes other than Title 18 could easily involve a conspiracy under 18 U.S.C. § 371."[252] As such, the conspiracy violation, as a Title 18 offense, would be reportable under the mandatory disclosure rule. But this argument may not work in every instance involving the PIA.

Title 18 U.S.C. § 371 applies to an "agreement whereby a federal employee will act to promote private benefit in breach of his duty . . . if the proper functioning of the Government is significantly affected thereby."[253] Such a statute seems logical on its face, as most cases likely involve an offeror of the information and a recipient. Indeed, in order to obtain information, someone must have disclosed it.[254]

250. *See* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1197 (4th Cir. 1976).

251. *See* Shermco Indus. v. Sec'y of U.S. Air Force, 452 F. Supp. 306, 323 (N.D. Tex. 1978) (stating that "[c]ost proposals submitted to an agency to secure award of a procurement contract are not covered within the categories of information listed in 18 U.S.C. § 1905").

252. *ABA MDR Guide*, *supra* note 7, at 45.

253. United States v. Peltz, 433 F.2d 48, 51–52 (2d Cir. 1970) (quoting Haas v. Henkel, 216 U.S. 462, 479 (1910)) (stating that "[t]he statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government"); *see also Haas*, 216 U.S. at 479–80 (stating that "any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of [the Government's] operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States").

254. *Cf.* Computer Tech. Assocs., Inc., B-288622, 2001 CPD ¶ 187, at 5 (Comp. Gen. Nov. 7, 2001) (noting that awardee firm's help desk operator had hacked into the General Services Administration's e-mail system to obtain competitors' bid information).

For a contractor, the conspiracy statute has an obvious potential gap, however, because it requires an agreement to defraud between two or more parties. Proof of a conspiratorial agreement may present a significant challenge,[255] and this may in effect quash the contractor's sense of obligation to disclose. The PIA, in contrast, allows the contractor to find that an impropriety has occurred without finding that the wrongdoer had acted in concert with anyone else.[256] Including the PIA in the mandatory disclosure rule, therefore, is necessary to ensure that where the evidence does not support a finding of a conspiracy, contractors would still have to report the misuse of confidential information.

D. *The Procurement Integrity Act and Mandatory Disclosure Rule Both Exist to Promote Procurement Integrity*

Simply stated, adding the PIA to the mandatory disclosure rule makes sense. Both the PIA and the mandatory disclosure rule promote integrity in the procurement process. Amending the mandatory disclosure rule to include the PIA would not be a gratuitous act, but instead a recognition of its logical connection to the purpose of the rule.

When Congress passed the PIA in 1988, it intended to make the "ethics guidelines indelibly clear" for the procurement community so as to restore the public's confidence in the procurement system.[257] More than twenty years later, DoJ proposed the mandatory disclosure rule for very similar reasons: "to emphasize the critical importance of integrity in contracting."[258] Thus, although the mandatory disclosure rule's drafters had to make choices regarding which of the thirty statutes in the U.S. Code that relate to procurement integrity in some form or another belonged in the mandatory disclosure rule,[259] it seems curious they excluded the one statute that actually includes procurement integrity in its title.

Additionally, both the PIA and the mandatory disclosure rule exist specifically in order to improve the procurement system. While the mandatory dis-

255. As the Fourth Circuit recently stated, "Agreement between conspirators often presents difficult proof problems." United States v. Abu Ali, 528 F.3d 210, 238 (4th Cir. 2008) (citations omitted).

256. A bid protest case illustrates this issue. *See* Kellogg Brown & Root Servs., Inc., B-400861 et al., 2009 CPD ¶ 54, at 2–9 (Comp. Gen. Feb. 23, 2009). There, the Contracting Officer sent an e-mail to Kellogg Brown & Root's (KBR) program manager regarding adverse past performance information but inadvertently attached a file containing source selection information, proprietary information of KBR's competitors. *See id.* at 2. The KBR program manager subsequently used the information to his company's competitive advantage. *See id.* at 9. He certainly never entered into any agreement with the Contracting Officer to defraud the Government, and a prosecutor may have had a difficult time proving that the program manager discussed the information with anyone at KBR and then agreed to use it in a way to defraud the United States.

257. 134 Cong. Rec. 32,156 (1988) (statement of Sen. Glenn).

258. FAC 2005-28, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,071 (Nov. 12, 2008) (final rule, implementing FAR Case 2007-006) (codified in scattered sections of FAR pts. 2, 3, 9, 42, 52).

259. *See* Seyfarth Shaw LLP, The Government Contract Compliance Handbook app. A-1 to -18 (Steven L. Briggerman et al. eds., Thomson/West 4th ed. 2006).

closure rule does so by citing Title 18 and the Civil False Claims Act, both can apply to conduct outside of the procurement system. They are thus laws of general application. The PIA, on the other hand, will apply only to a procurement. In working with a mandatory disclosure requirement, then, a contractor would be more familiar with the PIA than with the litany of Title 18 laws because it presents rules specifically applicable to his everyday activities.

Limiting the mandatory disclosure rule to Title 18 offenses has some appeal in that it clearly defines for contractors what laws the mandatory disclosure rule covers. However, the decision to make the mandatory disclosure rule's coverage limited to Title 18 does not compellingly justify excluding the PIA. Falling outside Title 18 should not prevent the PIA, a procurement-centric statute, from being an anticorruption tool worthy of inclusion in the procurement-centric mandatory disclosure rule.

VI. CONCLUSION

The PIA should be made a part of the mandatory disclosure rule. In fact, not including the PIA in the mandatory disclosure rule undermines a claim that the PIA is an "important" statute governing the procurement process. If mandatory disclosure is to be a part of the future of procurement regulation, then it should incorporate those laws that govern procurement professionals' everyday conduct. The PIA is one of those laws.

The PIA may be a fairly recent addition to the U.S. Code, but it has come a long way. Congress passed it, in part, out of a concern that the existing laws did not adequately protect the procurement system; it thus saw the PIA as necessary to address new types of procurement irregularities.[260] Now, with the mandatory disclosure rule the FAR Council has determined government procurement has changed sufficiently enough to require another rule to further procurement integrity. This new rule requiring disclosure to protect the procurement system's integrity and the PIA belong together.

The PIA has served to limit contracting improprieties by setting forth explicit prohibitions against disclosing and receiving confidential procurement information, and by barring specified interactions with contractors. The PIA would become a more effective anticorruption device were the FAR Council to amend the mandatory disclosure rule to incorporate the PIA. Given recent concerns about the possibility of an increase in potential PIA violations, making such a change appears timely. All forms of procurement irregularity are harmful, and one is not more sinister than another. Any rule that can minimize procurement misconduct, in any of its forms, should be as inclusive as possible.

And changing the rule would not be complicated. The FAR Council needs to add only seven words so that the mandatory disclosure rule would call for

260. 134 Cong. Rec. 32,156 (Oct. 20, 1988) (statement of Sen. Glenn).

disclosure of "violations found in Title 18 of the United States Code; *a violation of the Procurement Integrity Act*; or a violation of the civil False Claims Act (31 U.S.C. 3729–3733)."[261]

Including the PIA in the mandatory disclosure rule is desirable not because it will lead to more criminal prosecutions, civil judgments, bid protests, and suspensions and debarments, even if that will be a likely short-term result. Rather, it is desirable because in the long-term, requiring contractors to self-report PIA violations will help create a more honest procurement system, one where contractors would be confident that their competitors will honor the rules, and if not, that the proper authorities will be made aware of any violation. The competitive process will improve as a result, since a contractor is more likely to participate in a system where its competitors will be forced to reveal their misconduct. Because of that enhanced competition, the Government will obtain the best value for the taxpayers' money, perhaps the most important overall objective for any procurement system.

261. As this suggested change demonstrates, the mandatory disclosure rule should include any violation of the PIA, not only violations of its criminal provisions.